(13)

No. 06-413
Title: Jeffrey Uttecht, Superintendent, Washington State Penitentiary, Petitioner
v.
Cal Coburn Brown
Docketed: September 22, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-35998)
Decision Date: June 19, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 18 2006	Petition for a writ of certiorari filed. (Response due October 23, 2006)
Sep 18 2006	Appendix of Jeffrey Uttecht, Superintendent, Washington State Penitentiary filed.
Oct 11 2006	Order extending time to file response to petition to and including December 1, 2006.
Nov 30 2006	Brief of respondent Cal Coburn Brown in opposition filed.
Nov 30 2006	Motion for leave to proceed in forma pauperis filed by respondent.
Dec 8 2006	Reply of petitioner Jeffrey Uttecht, Superintendent, Washington State Penitentiary filed.
Dec 13 2006	DISTRIBUTED for Conference of January 5, 2007.
Jan 8 2007	DISTRIBUTED for Conference of January 12, 2007.
Jan 12 2007	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 12 2007	Petition GRANTED.
Jan 26 2007	Motion to appoint counsel filed by respondent Cal Coburn Brown.
Feb 5 2007	SET FOR ARGUMENT ON Tuesday, April 17, 2007.
Feb 7 2007	Motion DISTRIBUTED for Conference of February 23, 2007.
Feb 14 2007	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Feb 16 2007	Record received from U.S.D.C. for Western District of Washington (Seattle). (4 boxes)
Feb 21 2007	Brief amici curiae of Oregon, et al. filed.
Feb 23 2007	Brief of petitioner Jeffrey Uttecht, Superintendent, Washington State Penitentiary filed.
Feb 23 2007	Joint appendix filed.
Feb 26 2007	Motion to appoint counsel filed by respondent GRANTED. Suzanne L. Elliott, Esq., of Seattle, Washington is appointed to serve as counsel for the respondent in this case.
Feb 26 2007	Brief amicus curiae of United States filed.
Mar 8 2007	CIRCULATED.
Mar 22 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 28 2007	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Mar 29 2007	Brief of respondent Cal Coburn Brown filed. (Distributed)
Mar 30 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Apr 2 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 10 2007	Reply of petitioner Jeffrey Uttecht, Superintendent, Washington State Penitentiary filed. (Distributed)
Apr 17 2007	Argued. For petitioner: John J. Samson, Assistant Attorney General, Olympia, Wash.; and

Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Suzanne Lee Elliott, Seattle, Wash. (Appointed by this Court.)

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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FORMER CAPITAL CASE

QUESTION PRESENTED

In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment.

Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

PARTIES

The petitioner is Jeffrey A. Uttecht, the Superintendent of the Washington State Penitentiary. Mr. Uttecht is the successor in office to John Lambert who was the respondent-appellee in the Ninth Circuit. The respondent is Cal Coburn Brown.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT 3

1. Background 3

2. Proceedings In The Washington Courts 6

   a. Trial Court 6

   b. The Washington Supreme Court 8

3. Habeas Corpus Proceedings 10

   a. The District Court 10

   b. The Ninth Circuit Panel Decision 11

   c. Dissent From The Denial Of Rehearing En Banc 13

REASONS FOR GRANTING THE PETITION 15

1. The Decision Below Did Not Follow *Witt* And *Darden* And Conflicts With Circuit Court Decisions Requiring Deference To The Trial Court 16

2. The Decision Below Did Not Follow *Witt* and *Darden* And Conflicts With Circuit Court Decisions Requiring A Presumption Of Correctness For Implied Findings Of Fact 21

3. Under *Witt* And *Darden*, The Decisions Of The Washington Courts Were A Reasonable Application Of Clearly Established Federal Law As Determined By This Court 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Brosseau v. Haugen
543 U.S. 194 (2004) 16

Brown v. Lambert
451 F.3d 946 (9th Cir. 2006) 1

Clemons v. Luebbers
381 F.3d 744 (8th Cir. 2004) 20, 23

Darden v. Wainwright
477 U.S. 168 (1986) 4, 15–18, 22–23

Gray v. Mississippi
481 U.S. 648 (1987) 24

Hale v. Gibson
227 F.3d 1298 (10th Cir. 2000) 20

In re the Pers. Restraint Petition of Brown
143 Wash. 2d 431, 21 P.3d 687 (2001) 10

Irvin v. Dowd
366 U.S. 717 (1961) 3

Kinder v. Bowersox
272 F.3d 532 (8th Cir. 2001) 19, 20

Lavallee v. Delle Rose
410 U.S. 690 (1973) 21

Marshall v. Lonberger
459 U.S. 422 (1983) 21

Martini v. Hendricks
348 F.3d 360 (3d Cir. 2003) 18, 23

Morgan v. Illinois
504 U.S. 719 (1992) 4

Patton v. Yount
467 U.S. 1025 (1984) 4, 26

Sallahdin v. Gibson
275 F.3d 1211 (10th Cir. 2002) 20

State v. Brown
132 Wash. 2d 529, 940 P.2d 546 (1997) 1

Stewart v. LaGrand
526 U.S. 115 (1999) 16

United States v. Barnette
211 F.3d 803 (4th Cir. 2000) 18, 19

United States v. Powell
469 U.S. 57 (1984) 3

United States v. Webster
162 F.3d 308 (5th Cir. 1998) 19

Wainwright v. Witt
469 U.S. 412 (1985) 3–5, 15–17, 22–24

Williams v. Taylor
529 U.S. 362 (2000) 24

Constitutional Provisions

U.S. Const. amend. VI 1, 3

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) 2

28 U.S.C. § 2254(e)(1) 2, 12

28 U.S.C. 2254(e)(1) 5, 22

Wash. Rev. Code § 10.95.030 25

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Jeffrey A. Uttecht, the Superintendent of the Washington State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, issued upon the denial of a timely petition for rehearing en banc, is reported at *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006) (Pet. App. 1a–41a). The order of the United States District Court for the Western District of Washington is unpublished. Pet. App. 43a–91a. The Washington Supreme Court's opinion affirming Brown's conviction and sentence on direct appeal is reported at *State v. Brown*, 132 Wash. 2d 529, 940 P.2d 546 (1997) (Pet. App. 92a–221a).

JURISDICTION

The court of appeals first entered its opinion December 8, 2005. Pet. App. 1a. The court of appeals entered an amended opinion, and denied a timely petition for rehearing *en banc*, June 19, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The sixth amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(e)(1) provides:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

STATEMENT

Respondent Cal Brown raped and tortured an innocent woman for two days before killing her and dumping her body in a parking lot. Brown was convicted of aggravated first degree murder and sentenced to death. During jury selection, the trial court dismissed a juror because his answers during voir dire persuaded the judge that the juror's views on the death penalty would prevent or substantially impair the juror from faithfully and impartially applying the law. Defense counsel did not object to the juror's removal. The Ninth Circuit Court of Appeals, over the dissent of five judges who would have granted petitioner's motion for rehearing en banc, overturned the death sentence because it concluded that the trial court judge erred in removing the juror.

1. Background

"Jurors . . . take an oath to follow the law as charged, and they are expected to follow it." *United States v. Powell*, 469 U.S. 57, 66 (1984). And the Sixth Amendment requires that a case be heard by a "panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A judge must exclude potential jurors who are unable to set aside preconceptions and to decide the case on the evidence presented in court. *Irvin*, 366 U.S. at 722–23. The judge must exclude a prospective juror where "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

In a capital case, a juror's views about the death penalty may prevent the juror from being impartial and following the law. Thus, the state may exclude jurors opposed to capital punishment because "those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Witt*, 469 U.S. at 423. On the other hand, "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The Constitution does not require a finding that the juror would "automatically" vote for or against the death penalty, and the Constitution does not require a showing of bias by "unmistakable clarity." *Witt*, 469 U.S. at 424. If the juror's views on the death penalty would substantially impair the juror's ability to perform the duties of a juror, the judge must remove the juror. *Id.*; *Morgan*, 504 U.S. at 728–29.

The issue of juror impartiality is necessarily one of fact, since it is based largely upon determinations of credibility and demeanor, and the reviewing court owes great deference to the judge who actually observed the juror. *Witt*, 469 U.S. at 429; *Darden v. Wainwright*, 477 U.S. 168, 175 (1986); *Patton v. Yount*, 467 U.S. 1025, 1038–39 (1984). The issue of impartiality cannot be left to the cold record of a trial transcript, and the "inquiry does not end with a mechanical recitation of a single question and answer." *Darden*, 477 U.S. at 176. "This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in

the manner of a catechism." *Witt*, 469 U.S. at 424. Rather, the issue is resolved "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Id.* at 428. Regardless of the answers given on voir dire, common sense tells us, and experience has proven, that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425–26.

The deference owed to state courts is increased under the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. 2254(e)(1) requires that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The "question of challenge for bias is a 'factual issue' covered by the [statutory presumption of correctness.]" *Witt*, 469 U.S. at 430. The application of the statutory presumption does not require a "written finding, written opinion, or other reliable and adequate written indicia." *Id.* Rather, a

> "transcript of the voir dire [showing that the juror] was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked [the juror] to 'step down.' Nothing more was required under the circumstances to satisfy the statute." *Id.*

2. Proceedings In The Washington Courts

a. Trial Court

Since the prosecutor was seeking the death penalty, before the trial began potential jurors completed questionnaires that included general questions on the death penalty. Jurors who indicated an opposition to the death penalty were questioned individually on whether their views would prevent or substantially impair their ability to follow the court's instructions.

Mr. Deal expressed concerns with the death penalty in his questionnaire. Pet. App. 228a–29a, 235a. Mr. Deal stated he was in favor of the death penalty only if it was proved beyond a shadow of a doubt that a person has killed and would kill again. Pet. App. 235a. As a result of his statement, Mr. Deal was individually questioned regarding his ability to impose the death penalty in Brown's case. During this questioning, Mr. Deal said he believed the death penalty was appropriate only in severe cases. Pet. App. 224a. When defense counsel asked him to explain when he thought the death penalty would be appropriate, Mr. Deal said, "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." Pet. App. 228a. Counsel explained that the trial would not involve much testimony on whether Brown might kill again since the alternative sentence was life imprisonment without parole, and counsel asked whether that would frustrate Mr. Deal. Pet. App. 228a–229a. Mr. Deal said, "I'm not sure." Pet. App. 229a. Mr. Deal repeated that he thought the death

penalty was appropriate only in "severe situations." Pet. App. 229a.

The prosecutor then questioned Mr. Deal. Pet. App. 235a. Mr. Deal again said he favored the death penalty only if it is proved beyond a shadow of a doubt that a person has killed and would kill again. Pet. App. 235a. The prosecutor explained that "beyond a reasonable doubt" does not mean "beyond all doubt or beyond any shadow of a doubt," and the prosecutor asked, "would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?" Pet. App. 236a. Mr. Deal responded, "I guess it would have to be in my mind very obvious that the person would reoffend." Pet. App. 236a.

Mr. Deal had just learned during the jury selection process that Washington had life imprisonment without parole. Pet. App. 238a. When Mr. Deal previously stated he could impose the death penalty, he had assumed the person would be eligible for parole. Pet. App. 237a–238a. The prosecutor asked whether Mr. Deal could think of a time when he would be willing to impose the death penalty, knowing now the only alternative sentence was life imprisonment without parole. Pet. App. 238a. Mr. Deal said, "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." Pet. App. 238a. When asked about the idea of the defendant having to kill again, Mr. Deal reiterated that the death penalty was appropriate only in severe situations. Pet. App. 239a.

The prosecutor challenged Mr. Deal for cause, arguing that his statements showed he could impose the death penalty only if the defendant was in a position to kill again. Pet. App. 241a–242a. The prosecutor argued Mr. Deal had not said anything to show he could overcome his belief that the death penalty is appropriate only when it is proved that a defendant will be able to kill again:

> "And if a person kills and will kill again. And I think he had some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge." Pet. App. 241a–242a

To the request to remove Mr. Deal, Brown's defense counsel said: "We have no objection . . . ." Pet. App. 242a. The judge then removed Mr. Deal based upon the prosecution's request and defense counsel's agreement. Pet. App. 242a. By removing Mr. Deal, the judge implicitly found as fact that Mr. Deal was substantially impaired in his ability to perform the duties of a juror. Brown was subsequently convicted of aggravated first degree murder and sentenced to death.

b. The Washington Supreme Court

On direct appeal, the Washington Supreme Court affirmed the removal of Mr. Deal. Pet. App. 173a. According to the court, "[t]he standard for ruling on challenges for cause in a death penalty

case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror according to instructions and the oath taken by jurors." Pet. App. 171a. In applying this standard, the court "gives deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially." Pet. App. 171a. The reason for this deference is that "the trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial." Pet. App. 171a. The "manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." Pet. App. 171a.

Applying these standards, the Washington Supreme Court concluded that the trial court properly exercised its discretion in removing Mr. Deal. The court noted that the "[a]ppellant did not object at trial to the State's challenge of Richard Deal for cause" and that "[o]n voir dire he indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. By affirming the trial judge, the Washington Supreme Court also found as fact that Mr. Deal was substantially impaired in his ability to perform the duties of a juror.

The Washington Supreme Court affirmed the conviction and sentence, and subsequently denied Brown's personal restraint petition. *In re the Pers. Restraint Petition of Brown*, 143 Wash. 2d 431,

21 P.3d 687 (2001). Brown did not raise the issue of Mr. Deal's removal in this personal restraint petition.

3. Habeas Corpus Proceedings

a. The District Court

Brown filed a federal habeas corpus petition alleging, among other things, that the trial judge improperly removed Mr. Deal as a juror. The district court rejected this claim. In considering the claim, the district court stated that, "[u]pon habeas review, determination as to individual juror bias in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness." Pet. App. 73a–74a. Thus, "[a] petitioner must rebut such a finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)." Pet. App. 74a. According to the district court,

> "[t]he standard for determining when the court may exclude a prospective juror because of his or her views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. A juror's bias need not be proved with unmistakable clarity." Pet. App. 74a (citation omitted) (internal quotation marks omitted).

In reviewing the record, the district court noted that Mr. Deal "indicated that the death penalty was appropriate in 'severe' situations (SR 2199), such as when 'a person is, would be incorrigible and would reviolate if released.' (SR

2203–04.)" Pet. App. 77a. Mr. Deal "indicated that he could consider the options of life without parole and death, and could vote for a death sentence if he was 'convinced that was the appropriate measure.' (SR 2216.)" Pet. App. 77a. However, the district court observed that "Mr. Deal also indicated some confusion about the impact of a life sentence without parole and the standard of proof. Mr. Deal stated that he would only impose the death penalty if someone could kill again on parole . . . ." Pet. App. 77a.

The district court concluded that these state court "decisions were not contrary to, or an unreasonable application of, clearly established federal law as established by the Supreme Court." Pet. App. 78a. First, because both "the trial court in excusing the jurors, and the Washington Supreme Court is [sic] addressing Petitioner's claim of improper dismissal, applied [*Witt's*] standard." Pet. App. 78a–79a. Second, "[t]here is sufficient evidence to establish that [Mr. Deal's] views would 'prevent or substantially impair' his . . . ability to carry out the duties imposed on jurors." Pet. App. 78a.

b. The Ninth Circuit Panel Decision

Brown appealed to the Ninth Circuit. The Ninth Circuit granted habeas relief and reversed Brown's sentence, concluding the state trial court erred by removing Mr. Deal as a juror.

According to the Ninth Circuit, "excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law." Pet. App. 13a. The court concluded that this standard was not satisfied because "[n]owhere did

the court find that [Mr. Deal] would be unable to follow instructions." Pet. App. 13a. Indeed, the Ninth Circuit held that no such finding could have been entered because Mr. Deal "'ultimately stated that [he] could consider the death penalty in an appropriate case.'" Pet. App. 13a (quoting *Gray v. Mississippi*, 481 U.S. 648, 653 (1987)). Thus, "[h]ad there been a finding that [Mr. Deal] was 'substantially impaired' in his ability to follow the law, it would have been unreasonable." Pet. App. 13a–14a

The Ninth Circuit also found the rationale of the Washington Supreme Court "misplaced and insufficient." Pet. App. 14a. This was because Mr. Deal's statement that "he would impose the death penalty where the defendant would be likely to kill again did not exclude the possibility that [he] would vote to impose the death penalty in other circumstances as well." Pet. App. 14a.

The Ninth Circuit did not apply the presumption of correctness for state court factual determinations required by 28 U.S.C. § 2254(e)(1) because it held that the Washington courts made no factual finding. The Ninth Circuit also refused to give any deference to the trial court's ability to observe the demeanor of the witness. The Ninth Circuit held that "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." Pet. App. 17a n.8. The Ninth Circuit concluded that Mr. Deal's "clear words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary." Pet. App. 17a n.8. The court concluded that

> "[i]f appellate courts must defer to trial court findings on a transcript such as this because a witness may somehow have contradicted his spoken words through some unknown facial expression or body language, not only is *Witherspoon* a dead letter, but all substantial evidence review of trial court factual findings is obsolete." Pet. App. 17a n.8.

c. Dissent From The Denial Of Rehearing En Banc

The state moved for rehearing en banc. The motion was denied but Judge Tallman, joined by four other judges, dissented from the denial. The dissent focused on two main points. First, that the panel went beyond the limited review authorized by the Anti-terrorism and Effective Death Penalty Act (AEDPA). According to the dissent,

> "under AEDPA, the dismissal must have been both objectively unreasonable in that the state court was not merely wrong, but actually unreasonable, and the state court must have confronted a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrived at a result different from Supreme Court precedent." Pet. App. 26a (citations omitted) (internal quotation marks omitted).

According to the dissent, "the panel has overstepped its authority under AEDPA. Congress surely intended through enacting AEDPA to end the practice by some federal judges of granting habeas relief to overturn state capital cases on rulings that

even the parties did not urge to be erroneous when trying their case." Pet. App. 33a.

Second, the dissent stated that the "opinion impermissibly lowers the level of deference which comity demands that we as a federal habeas court afford state courts in reviewing their decisions and findings of fact." Pet. App. 40a. This "lower standard of 'reasonableness review' severely handicaps a trial judge's ability to go beyond the scope of mere words and phrases taken piecemeal from the entire voir dire process." Pet. App. 40a–41a.

The dissent concluded that the decisions of the Washington courts were not objectively unreasonable. The dissent disagreed with the panel's conclusion that there was no finding of substantial impairment by the Washington courts. According to the dissent "the Washington Supreme Court need not *explicitly* declare that [Mr. Deal] was 'substantially impaired' for its affirmance to count under AEDPA." Pet. App. 38a (emphasis in original). Although the Washington Supreme Court

> "did not incant the words 'substantially impaired' . . . . [b]ased upon the rulings of both the trial and appellate courts, and the record in this case, we can certainly conclude that the Washington courts found appropriate the decision to excuse [Mr. Deal] on the only ground proffered by the prosecutor–that he could not discharge his oath as a juror to follow state death penalty law." Pet. App. 38a.

In reviewing the record, the dissent concluded that Mr. Deal was "confused." Pet. App. 29a. He "wavered back and forth between claiming to

understand what he was being told about when the Washington capital sentencing law applied, yet he reiterated his erroneous belief that death was applicable only for recidivists." Pet. App. 34a. Thus, "[t]he transcript reflects that he seemed easily led by both the prosecution and defense counsel into declaring an understanding that everyone in the courtroom recognized he simply did not have." Pet. App. 34a.

The dissent also focused on the fact that defense counsel did not object to Mr. Deal's removal even though "[d]efense counsel did move in writing for reconsideration of the trial court's dismissal for cause of [another juror.]" Pet. App. 32a. This was important because "[q]uite clearly those who had the opportunity to watch [Mr. Deal's] testimony, including the trial judge, the prosecution, and defense counsel, both during and after questioning him on voir dire, felt that [Mr. Deal] was properly dismissed for cause." Pet. App. 33a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition and summarily reverse because the Ninth Circuit panel explicitly refused to follow *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986). First, the Ninth Circuit refused to give any deference to the decision of the trial court judge who had the opportunity to observe the juror's demeanor. The court held that no such deference was required if the trial transcript was clear. Pet. App. 17a n.8 ("It is true, as the dissent suggests, that we owe the trial judge deference because of his ability to observe demeanor, but demeanor can only

shed light on ambiguous language; it cannot contradict the witness's clear words."). Second, the Ninth Circuit refused to recognize the trial court's implicit finding of fact that the juror was substantially impaired and to apply the statutory presumption of correctness to that finding. Pet. App. 13a ("Nowhere did the court find that [Mr. Deal] would be unable to follow instructions.").

Instead of following *Witt* and *Darden*, the Ninth Circuit substituted its judgment for that of the trial court. In that situation, it is appropriate for the Court to "exercise [its] summary reversal procedure . . . simply to correct a clear misapprehension of the [law.]" *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004). *Stewart v. LaGrand*, 526 U.S. 115, 118 (1999). The Court should grant the petition and summarily reverse.

1. The Decision Below Did Not Follow *Witt* And *Darden* And Conflicts With Circuit Court Decisions Requiring Deference To The Trial Court

The Ninth Circuit refused to grant any deference to the trial court's ability to judge demeanor stating that "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." Pet. App. 17a n.8. As Judge Tallman explained in his dissent, the panel's decision "impermissibly lowers the level of deference which comity demands that we as a federal habeas court afford state courts in reviewing their decisions and findings of fact." Pet. App. 40a. The panel cites no authority for its assertion that a reviewing court

need not defer to the trial court if it can find a clear statement somewhere in the transcript of the voir dire proceeding. The decision below does not follow *Witt* and *Darden*, and conflicts with decisions of the Third, Fourth, Fifth, Eighth, and Tenth Circuits.

Witt and *Darden* both dealt with the disqualification of a juror because of the juror's views about the death penalty. Both Courts emphasized the need to defer to the trial court judge. According to *Witt*, the "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424. Many jurors "simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Id.* at 424–25. This is "why *deference must be paid to the trial judge* who sees and hears the juror." *Id.* at 426 (emphasis added).

In *Darden*, the trial court asked the juror: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" *Darden*, 477 U.S. at 178. When the juror responded "'Yes, I have' he was excused." *Id.* The defendant argued that removal was improper because the trial court's question did not state the correct standard. This Court rejected that argument because the trial court, "*aided as it undoubtedly was by its assessment of the potential juror's demeanor*, was under the obligation to determine whether [the juror's] views would prevent or substantially impair the performance of his duties as a juror . . . ." *Id.* (emphasis added)

(internal quotation marks omitted). *Darden* concluded that, "[i]n making this determination, the trial court could take account of the fact that [the juror] was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear." *Id.*

The decision below also conflicts with decisions of other circuits of the court of appeals that follow *Witt* and *Darden*. In *Martini v. Hendricks*, 348 F.3d 360 (3d Cir. 2003), Martini sought to overturn his death sentence, claiming a juror was improperly removed. The juror was asked: "Would you be able to vote to impose the death penalty?" *Martini*, 348 F.3d at 364. The juror responded: "Yes, sir." *Id.* Indeed, the juror repeatedly answered that he could vote to impose the death penalty. *Id.* at 364–65. Under the reasoning of the Ninth Circuit panel, the juror's clear statement eliminated any requirement to defer to the trial court judge. However, the court denied habeas relief. Finding the defendant had failed to rebut the state court factual finding of substantial impairment, the Third Circuit concluded that the trial judge, "who saw and sized up" the juror, was "entitled to a very substantial deference." *Id.* at 367. The Third Circuit could not say "by clear and convincing evidence that the state trial judge . . . was incorrect in his finding." *Id.* at 368.

In *United States v. Barnette*, 211 F.3d 803, 812 (4th Cir. 2000), the court removed a juror who indicated he was "unclear as to his opinion on the death penalty." Similar to Mr. Deal in this case, the *Barnette* juror said he would prefer a life sentence unless the death penalty "was very, very, very, very well warranted." *Id.* Deferring to the trial judge's

"opportunity to observe [the juror] and assess his answers first-hand," the Fourth Circuit ruled the decision to remove the juror "was not clearly erroneous or an abuse of discretion." *Barnette*, 211 F.3d at 812.

In *United States v. Webster*, 162 F.3d 308, 340–41 (5th Cir. 1998), the defendant challenged the removal of a juror who, like Mr. Deal, said she could envision circumstances where she would impose a death sentence. The juror in *Webster* believed capital punishment was a deterrent. *Id.* Under the panel decision below, this would be the end of the inquiry, and no deference to the trial court would be required. However, as with Mr. Deal, the presence of the alternative sentence of life imprisonment raised serious questions about her ability to follow the law. *Id.* Deferring to the trial judge's "face-to-face credibility assessments," the Fifth Circuit found "the whole of her testimony could have left the court with the impression that she favored the death penalty as a theoretical necessity, but would not be able to recommend it." *Webster*, 162 F.3d at 341. The Fifth Circuit ruled the trial court did not abuse its discretion in removing the juror. *Id.*

In *Kinder v. Bowersox*, 272 F.3d 532, 542–43 (8th Cir. 2001), the defendant challenged the removal of jurors who said they could obey instructions and follow the law. Once again, under the panel decision these statements would have eliminated any need to defer to the trial court judge. Despite the jurors' "clear words," the Eighth Circuit deferred "to the trial judge's decisions regarding bias

because the judge's 'predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record.'" *Kinder*, 272 F.3d at 543 (quoting *Witt*, 469 U.S. at 429). Similarly, in *Clemons v. Luebbers*, 381 F.3d 744, 755 (8th Cir. 2004), Clemons challenged the removal of a juror who clearly said he could impose the death penalty. Denying relief, the Eighth Circuit deferred to the trial judge, concluding "the trial court's firsthand impressions trump the cold record." *Id.* at 756.

In *Sallahdin v. Gibson*, 275 F.3d 1211, 1224 (10th Cir. 2002), the juror first said he could not consider the death penalty, but later said he could consider imposing a death sentence. The juror said he thought the death penalty was appropriate if there were multiple deaths, but he could set aside his personal beliefs and follow the judge's instructions. *Id.* The Tenth Circuit deferred to the trial judge, concluding the finding of bias "turns on the juror's credibility and demeanor—matters which the trial court is in the best position to assess." *Id.* at 1225; *See also Hale v. Gibson*, 227 F.3d 1298, 1318 (10th Cir. 2000).

Witt, *Darden*, and these circuit court decisions all hold that the trial court's ability to judge the demeanor of the juror is entitled to deference. The Ninth Circuit panel below expressly ignored this requirement.

2. The Decision Below Did Not Follow *Witt* and *Darden* And Conflicts With Circuit Court Decisions Requiring A Presumption Of Correctness For Implied Findings Of Fact

The decision below expressly refused to recognize the trial court's implicit finding of fact that Mr. Deal was substantially impaired, and to apply the statutory presumption of correctness to that finding. The court stated that "[n]owhere did the court find that [Mr. Deal] would be unable to follow instructions." Pet. App. 13a. As Judge Tallman explained in his dissent, it was not necessary to "incant the words 'substantially impaired'" to have a finding that Mr. Deal was substantially impaired from performing is duty. Pet. App. 38a.

It is not necessary to have express findings. The Court explained this in *Marshall v. Lonberger*, 459 U.S. 422 (1983), in which the Court discussed its earlier decision *Lavallee v. Delle Rose*, 410 U.S. 690 (1973). In *Lavallee*, "the trial judge likewise failed to make express findings as to the defendant's credibility." *Marshall*, 459 U.S. at 433. *Lavallee* "held that because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony, its failure to grant relief was tantamount to an express finding against the credibility of the defendant." *Marshall*, 459 U.S. at 433. Similarly, in this case, if the trial court judge had not concluded that Mr. Deal was substantially impaired from performing his duty as a juror, he would not have excused Mr. Deal.

Not only did the panel decision fail to recognized the implied finding of impairment, it failed to give that finding the presumption of correctness required by 28 U.S.C. 2254(e)(1). This presumption of correctness is required by *Witt* and *Darden*. The Ninth Circuit's failure to follow *Witt* and *Darden* conflicts with decisions of the Third and Eighth Circuits.

This case is "on all fours" with *Witt*. In *Witt*, as in the decision below, the trial court did not enter a specific finding that the disqualified juror was impaired. The Court ruled that the presumption of correctness applied because "the question of challenge for bias is a 'factual issue' . . . ." *Witt*, 469 U.S. at 430. But the defendant argued the presumption of correctness did not apply because "this conclusion was not evidenced by a written finding, written opinion, or other reliable and adequate written indicia." *Id.* (internal quotation marks omitted). The Court rejected that argument holding that the presumption of correctness applied if there was a "transcript of the voir dire [showing that the juror] was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked [the juror] to 'step down.'" *Id.* *Witt* concluded, "[n]or do we think under the circumstances that the judge was required to announce for the record his conclusion that [the juror] was biased, or his reasoning. The finding is evident from the record." *Id.* This Court found it "noteworthy that [the trial court] was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to [the

juror's] recusal, or to attempt rehabilitation." *Witt*, 469 U.S. at 430–31. Similarly, in this case, Brown's defense counsel did not object to Mr. Deals dismissal. Pet. App. 242a.

This case is also "on all fours" with *Darden*. The trial court in *Darden* did not enter any specific findings of fact that the juror was impaired. *Darden*, 477 U.S. at 178. Despite the lack of an express finding that the juror was impaired, the Court held that the "trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness . . . ." *Id.* at 175. And, as in *Witt*, the Court looked to the transcript of the voir dire proceedings to make its analysis. *Darden* also observed that "[n]o specific objection was made to the excusal of [the juror] by defense counsel." *Darden*, 477 U.S. at 178.

The decision below also conflicts with decisions of other courts of appeal. The Third and Eighth Circuits have followed the holding in *Witt* and expressly applied the statutory presumption of correctness to the voir dire transcript. *Martini* v. *Hendricks*, 348 F.3d 360, 363 (3d Cir. 2003) ("A trial court's conclusion that a potential juror would be biased is a factual determination, and it is therefore entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1)." (Citation omitted.)); *Clemons v. Luebbers*, 381 F.3d 744, 753 (8th Cir. 2004) ("A trial court's finding of death qualification in the voir dire process is a factual determination entitled to the presumption of correctness established in 28 U.S.C. § 2254(e).").

Witt and *Darden* and these circuit court decisions all hold that the implied finding of the trial court, that a juror is substantially impaired, is entitled to the statutory presumption of correctness. The Ninth Circuit panel below expressly ignored this requirement.

3. Under *Witt* And *Darden*, The Decisions Of The Washington Courts Were A Reasonable Application Of Clearly Established Federal Law As Determined By This Court

The Washington Supreme Court concluded the trial judge acted properly in removing Mr. Deal. In light of the state court finding of fact, this state court decision was a reasonable application of clearly established federal law.[1]

Contrary to the Ninth Circuit's conclusion, Mr. Deal's responses during voir dire demonstrated he was substantially impaired in the ability to perform the duties of a juror. Mr. Deal repeatedly

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[1] The Ninth Circuit found the state court decision contrary to *Gray v. Mississippi*, 481 U.S. 648 (1987). Pet. App. 12a-14a. However, the sole issue before the Court in *Gray* was whether the error was subject to a harmless error analysis. *Gray*, 481 U.S. at 657. The *Gray* Court specifically declared there was no need to delve into the intricacies of the *Witt* standard. *Id.* at 658. *Gray* did not involve a state court finding that the removed juror was substantially impaired. Pet. App. 27a (Tallman, dissenting from denial of rehearing (citing *Gray*, 481 U.S. at 653–55)). The trial court decision in this case was not contrary to the holding in *Gray* because the facts in this case were not "materially indistinguishable" from those in *Gray*, and the holding of the trial court was not the opposite of the holding in *Gray*. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

indicated that he believed a "severe situation" appropriate for a death sentence existed only where the defendant would otherwise be released and kill again. *See, e.g.*, Pet. App. 235a (in his questionnaire, Mr. Deal stated death penalty was appropriate if proved beyond a shadow of a doubt that a person has killed and would kill again); Pet. App. 228a (indicating death penalty appropriate if person would reviolate if released); Pet. App. 228a–229a. (Mr. Deal may be frustrated since the trial would not involve much testimony on whether Brown might kill again); Pet. App. 236a ("I guess it would have to be in my mind very obvious that the person would reoffend."); Pet. App. 238a (Mr. Deal would have to think about whether he could impose the death penalty if the alternative sentence was life imprisonment without parole). The trial court reasonably concluded Mr. Deal was substantially impaired because he could impose the death penalty only if Brown would otherwise be released and kill again.

In Washington, the prosecutor need not prove the defendant will get out and kill again. Proof of such a fact is nearly impossible since the only alternative sentence to death is life without possibility of parole. Wash. Rev. Code § 10.95.030. Instead of considering whether the defendant may kill again, the jury considers "only the statutory question 'Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?'" Pet. App. 189a (quoting Wash. Rev. Code 10.95.060(4)). Because Brown would never be

released under Washington law, and Mr. Deal believed the death penalty was only appropriate where the defendant would be released and kill again, it is reasonable that Mr. Deal could never impose the death penalty in this case. The reasonableness of this conclusion is enhanced by Brown's lack of an objection to Mr. Deal's removal as a juror.

The trial judge had the singular opportunity to assess Mr. Deal's behavior and demeanor, placing the judge in a position far superior to that of the reviewing courts. *Patton v. Yount*, 467 U.S. 1025, 1037–38 nn.12 & 14 (1984). "The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Id.* at 1039. The judge may accept some of the juror's answers and discredit others. *Patton*, 467 U.S. at 1039. "It is here that the federal court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty." *Id.* at 1040. In Brown's trial, "[t]he dismissal was simply a reasonable judgment call made by the only judge who actually saw and heard [Mr. Deal] during voir dire." Pet. App. 28a. (Tallman, J., dissenting from denial of rehearing).

The prosecutor, having heard Mr. Deal's answers and observing his behavior, believed Mr. Deal was substantially impaired. The trial judge, having observed Mr. Deal during voir dire, agreed with the prosecutor and removed Mr. Deal as a juror, implicitly finding Mr. Deal was substantially impaired. Brown's defense counsel, having

witnessed Mr. Deal during voir dire, did not object. In light of these facts, the Washington Supreme Court reasonably concluded that the trial judge properly exercised his discretion in removing Mr. Deal as a juror.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be summarily reversed.

RESPECTFULLY SUBMITTED.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

Description	Page
Order and Amended Opinion, *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006)	1a
Judgment In A Civil Case, *Brown v. Lambert*, U.S.D.C. Western District of Washington Cause No. C01-715C	42a
Order, *Brown v. Lambert*, U.S.D.C. Western District of Washington Cause No. C01-715C	43a
Opinion, *State of Washington v. Brown*, Washington State Supreme Court Cause No. 61320-6	92a
Excerpts of Verbatim Report of Proceedings, November 3, 1993, *State of Washington v. Brown*, King County Superior Court Cause No. 91-1-03233-1	222a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cal Coburn Brown, *Petitioner-Appellant,* v. JOHN LAMBERT, Superintendent of Washington State Penitentiary, *Respondent-Appellee.*	No. 04-35998 D.C. No. CV-01-00715-JCC ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Western District of Washington, John C. Coughenour, Chief Judge, Presiding

Argued and Submitted

July 14, 2005 – Pasadena, California

Filed December 8, 2005

Amended June 19, 2006

Before Stephen Reinhardt, Alex Kozinski and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Kozinski; Dissent from Denial of Rehearing En Banc by Judge Tallman

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SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court in part and remanded. The court

held that excusing for cause in a capital case a juror who stated unequivocally that he could consider the death penalty as an opinion if told to do so was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal.

Appellant Cal Brown confessed to both the rape and attempted murder of a woman in California, and the rape and murder of another woman in Washington. After pleading guilty in California and receiving a sentence of life imprisonment, Brown was tried in Washington in 1993. The trial judge excused juror X for cause based on her statement that she did not think that she could impose the death penalty. The judge also excused juror Y for cause, based on her strong opposition to the death penalty. Finally, the judge excused juror Z for cause, although he said that he believed in the death penalty and stated unequivocally that he could consider the death penalty as an option if told to do so. The jury convicted Brown of aggravated first-degree murder, and sentenced him to death. Brown exhausted his direct appeals, and state habeas proceedings. The Washington Supreme Court, in upholding the trial judge's decision to excuse jurors X, Y, and Z for cause, noted that Brown did not object at trial to the state's challenge of juror Z for cause; and that juror Z had made an incorrect statement of the law and misunderstood the state's burden of proof to be beyond a shadow of a doubt, although he was corrected later. Brown petitioned for a writ of habeas corpus in federal district court, raising an umber of constitutional claims regarding his trial and sentencing. The district court denied his

petition after an evidentiary hearing.

Brown appealed, challenging the constitutionality of the Washington death penalty statute on its face, arguing that it gives the jury no guidance on how to consider evidence of collateral crimes. Brown also argued that the three prospective jurors were erroneously dismissed for cause.

[1] The Washington death penalty statute requires the jury to deliberate on one question only: Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency? The Ninth Circuit has previously upheld the facial validity of the identical Washington statute against a challenge that it failed to adequately channel and guide jury sentencing discretion. **[2]** This holding necessarily precluded Brown's claim.

[3] Based on her response, the trial judge properly excused X for cause. **[4]** The trial judge properly excused juror Y for cause as well.

[5] The Supreme Court has explained that the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. **[6]** It is-and was at the time of Brown's trial in 1993-clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law. **[7]** Nowhere did the Washington Supreme Court find that juror Z

would be unable to follow instructions. Nor could the court have found this. Juror Z ultimately stated that he could consider the death penalty in an appropriate case. Had there been a finding that juror Z was substantially impaired in his ability to follow the law, it would have been unreasonable. **[8]** The reasons that the court did give for upholding Z's exclusion was misplaced and insufficient. **[9]** Juror Z's temporary misunderstanding of the prosecution's burden of proof was also irrelevant; it would have been easily corrected by the jury instructions, which juror Z gave every indication he would follow. **[10]** Finally, Brown's failure to object to juror Z's removal at trial did not alter the error analysis. Brown raised the juror Z claim on direct appeal, and the Washington Supreme Court did not find the claim to be waived or procedurally barred. Nor did the state allege that the claim was waived or barred, or that it was not exhausted in state court. **[11]** In sum, excusing juror Z for cause was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal.

[12] Having found that juror Z was erroneously excluded, it was unnecessary for Brown to demonstrate he was prejudiced by Z's exclusion. Prejudice is presumed. Thus, Brown's death sentence could not stand. The judgment of the district court had to be reversed.

COUNSEL

Suzanne Elliott and Gilbert H. Levy, Seattle, Washington, for the petitioner-appellant.

Rob McKenna, Attorney General, and John J.

Samson, Assistant Attorney General, Criminal Justice Division, Olympia, Washington, for the respondent-appellee.

ORDER

The opinion filed December 8, 2005, and reported at 431 F.3d 661, is withdrawn, and is replaced by the Amended Opinion, 04-35998, filed concurrently herewith. The petition for rehearing is otherwise denied.

A judge requested a vote on whether to rehear this case en banc, but a majority of the non-recused active judges did not vote in favor of en banc consideration. The petition for rehearing en banc is therefore **DENIED**. *See* Fed. R. App. P. 35. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

KOZINSKI, Circuit Judge:

We consider the exclusion of jurors for cause in a death penalty case.

Facts[1]

Cal Brown is not a nice man. In May 1991, he carjacked Holly Washa and drove her to a motel near the Seattle-Tacoma airport. Brown robbed, raped and tortured Washa while holding her hostage for two days. He bound and gagged her, penetrated her

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[1] For a more detailed discussion of the facts, see the Washington Supreme Court's opinion in Brown's direct appeal, *State v. Brown*, 940 P.2d 546, 555-59 (Wash. 1997) (en banc).

with foreign objects, whipped her and shocked her with an electrical cord. Eventually, Brown put Washa in the trunk of her car, slit her throat, stabbed her and left her to bleed to death in a parking lot.

Brown then flew to Palm Springs, California, to rendezvous with his next victim, Susan Schnell, whom he had met on an airplane a few days earlier. While inside their hotel room, Brown similarly robbed and raped Schnell, bound and gagged her, tortured and penetrated her. After handcuffing Schnell to the bed, Brown slit her throat and left her to die. Amazingly, Schnell was able to call the front desk and summon the police, who arrived and arrested Brown in the hotel parking lot.

Brown quickly confessed to both the rape and attempted murder of Schnell in California, and the rape and murder of Washa in Washington. After pleading guilty in California and receiving a sentence of life imprisonment, Brown was tried in Washington. A jury convicted Brown of aggravated first-degree murder, and sentenced him to death. Brown exhausted his direct appeals and state habeas proceedings. He then petitioned for a writ of habeas corpus in federal court, raising a number of constitutional claims regarding his trial and sentencing.[2] The district court denied his petition after an evidentiary hearing, and Brown appeals

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[2] Because Brown filed his habeas petition after April 23, 1996, we apply the "substantive review standards of the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996) ('AEDPA')." *Webster v. Woodford*, 369 F.3d 1062, 1066 (9th Cir.), *cert. denied*, 543 U.S. 1007 (2004); *see also Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

three issues relating to his death sentence.[3]

Facial Validity of Washington's Death Penalty Statute

Brown challenges the constitutionality of the Washington death penalty statute on its face, arguing that it gives the jury no guidance on how to consider evidence of collateral crimes.

[1] The Washington death penalty statute requires the jury to deliberate on one question only: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code § 10.95.060(4); *see also id.* § 10.95.070 (setting forth a non-exhaustive list of factors the jury may consider). We have previously upheld the facial validity of the identical Washington statute against a challenge that it "fails to adequately channel and guide jury sentencing discretion." *Campbell v. Kincheloe*, 829 F.2d 1453, 1464 (9th Cir. 1987) ("*Campbell I*"). In *Campbell I*, we viewed the statute in light of the construction given to it by the Washington Supreme Court, *see State v. Bartholomew*, 683 P.2d 1079, 1086-87 (Wash. 1984) (en banc), and held that the defendant's facial

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[3] In his "Statement of Issues," Brown also asks whether his "*conviction* [was] obtained in violation of the Due Process Clause of the Fourteenth Amendment. . . ." (Emphasis added.) But the claims Brown raises in the remainder of his brief relate only to his death sentence, not his conviction. Thus, we will consider only whether Brown is entitled to habeas relief with respect to his death sentence. *See Am. Int'l Enters. V. FDIC*, 3 F.3d 1263, 1266 n.5 (9th Cir. 1993) (holding that an issue mentioned in a statement of issues, but not addressed in the argument section of the brief, may be considered abandoned).

challenge was "meritless." *See Campbell I*, 829 F.2d at 1464; *see also Campbell v. Blodgett*, 978 F.2d 1502, 1513-14 (9th Cir. 1992) (per curiam) ("*Campbell II*").

[2] Brown's argument in this case is merely a subset of Campbell's facial challenge; he claims that the statute fails to adequately channel and guide jury sentencing discretion *with respect to evidence of collateral convictions*. Thus, our broader holding in *Campbell I*-that the Washington statute does not fail to adequately guide jury discretion with respect to *anything*-necessarily precludes Brown's claim. We have no occasion to reevaluate our earlier assessment of the statute. *See Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam) (noting that rulings by three-judge panels are "law of the circuit," and are binding on subsequent three-judge panels).

Jury Selection

Brown next argues that three prospective jurors were erroneously dismissed for cause, and that he was therefore sentenced by a "tribunal organized to return a verdict of death." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

[3] 1. Juror X was uncertain whether she would be able to impose the death penalty. Though she initially professed a willingness to follow the court's instructions, she later expressed serious reservations: "Oh, yeah, I could follow the instructions. I think that-actually making that decision, no." When the court asked her about her ability to vote for death, she responded, "I don't think I could. It would have to be so crystal clear. I would have to be-." Based on these responses, the trial

judge properly excused X for cause, finding that her views on the death penalty would "substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and oath." *Wainwright v. Witt,* 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas,* 448 U.S. 38, 45 (1980)) (internal quotation mark omitted).

[4] Juror Y's voir dire exposed even stronger antipathy toward the death penalty, bordering on moral outrage. She described the death penalty as "barbaric" and suggested that it "makes . . . brutes of us all." She expressed resentment toward the state of Washington for putting her in the position of choosing between life and death. Finally, when asked by the court if she would be able to consider sentencing anyone to death, Y "crossed her arms, held her hand up . . . and sat back."[4] The trial judge properly excused juror Y for cause as well, noting that her impairment was "obvious."

The voir dire examinations of jurors X and Y contrast sharply with the examination of juror Z. Z expressed no antipathy toward the death penalty; to the contrary, he stated that he "believe[d] in the death penalty." In explaining his views, Z outlined a

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[4] It is unclear from the record how Y "held her hand up." Presumably, she was holding her hand up with her palm out, in a motion often associated with the exclamation, "Talk to the hand (because the ears ain't listening)," phrase later popularized by Fran Drescher in the mover *Beautician and the Beast. See Terms of the 90s, Slange of the Nineties,* http://www.inthe90s.com/generated/terms.shtml (defining "Talk to the Hand" as "[a]nother way of saying 'I don't want to hear what you are saying.'"); *see also* Lynn Truss, *Talk to the Hand: The Utter Bloody Rudeness of the World Today* or *Six Good Reasons to Stay Home and Bolt the Door* (2005).

balanced and thoughtful position. For example, Z was discomfited by an earlier era in which "[i]t seemed like . . . [the death penalty] wasn't used at all," because he believed "there [a]re times when it would be appropriate [to impose the death penalty]." But he expressed caution that the death penalty be reserved for "severe situations": "I don't think it should never happen, and I don't think it should happen 10 times a week either." Z felt most comfortable imposing the death penalty where the defendant is "incorrigible and would reviolate if released," and less comfortable where the defendant is found to have been "temporarily insane." But he stated unequivocally that he could consider the death penalty as an option if told to do so.[5]

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[5] In fact, during the course of his voir dire, juror Z stated *six times* that he could follow the law and impose the death penalty, while not *once* stating that he might not be able to:

Q. Do you think that you could consider [the death penalty]?

A. Yes, I could.

. . . .

Q. [D]oes that mean what I'm hearing you say is that you could consider [the death penalty]?

A. I believe so, yes.

. . . .

Q. You would be willing to follow the law?

A. Yes.

. . . .

Q. [D]o you thin . . . you could impose [the death penalty]?

A. Yes, sir.

In essence, Z's views on whether to impose the death penalty mirrored Washington's death penalty statute itself: He believed a defendant should be put to death where his crime was appropriately severe but not otherwise, and was willing to take into account mitigating factors (mental health issues, for example), aggravating factors (likelihood of recidivism, for example) and the particular circumstances of the instant murder. *See* Wash. Rev. Code §§ 10.95.060, 10.95.070. Additionally, he was open to considering other types of mitigating circumstances, such as "somebody's childhood" or "emotional development," was welcoming of his fellow jurors' views, and was accepting of the heavy responsibility assigned to jurors by the state. Most importantly, he promised he would "follow the law" without reservation.

Despite these assurances, the prosecutor protested that Z was too reluctant to impose the death penalty, and that he would only vote for death if convinced that the defendant would "kill again." The prosecutor thus moved to excuse juror Z for cause, and the trial judge granted the motion without further inquiry.

[5] **2.** In 1985, and again in 1987, the Supreme Court explained that the "standard for

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. . . .

Q. [D]o you think you could also consider and vote for the death penalty under those circumstances?

A. I could consider it, yes.

Q. Then could you impose it?

A. I could if I was convinced that was the appropriate measure.

determining whether prospective jurors may be excluded for cause based on their views on capital punishment . . . is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (quoting *Witt*, 469 U.S. at 424, (quoting *Adams*, 448 U.S. at 45)). The Supreme Court insisted that capital jurors not be struck for cause unless they are unable to follow the court's instructions. Even jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* (quoting *Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (Rehnquist, J.)).

[6] Further, the Supreme Court significantly circumscribed the state courts' role in excusing jurors for cause in capital cases: It held that

> [t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law."

Id. at 658-59 (alterations in original) (citation

omitted) (quoting *Witt,* 469 U.S. at 423, and *Witherspoon,* 391 U.S. at 523). Thus, it is-and was at the time of Brown's trial in 1993-clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law.

[7] When the Washington Supreme Court upheld the trial judge's decision to excuse jurors X, Y and Z for cause, it found that both X and Y were "substantially impaired" in their ability to perform their duties as jurors. *Brown,* 940 P.2d at 585. Those findings are adequately supported by the record. But a similar finding is missing from the state court's discussion of juror Z. The court's entire review of Z's exclusion from the jury is as follows:

> Appellant did not object at trial to the State's challenge of [Z] for cause. At any rate, [Z] was properly excused. On *voir dire* he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing [Z] for cause.

Id. Nowhere did the court find that Z would be unable to follow instructions. Nor *could* the court have found this: Just like the juror at issue in *Gray,* juror Z "ultimately stated that [he] could consider the death penalty in an appropriate case." *Gray,* 481 U.S. at 653.[6] Had there been a finding that Z was

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[6] The dissent from denial of rehearing en banc agrees that the juror in *Gray* was improperly struck because she

"substantially impaired" in his ability to follow the law, it would have been unreasonable. *See* 28 U.S.C. §§ 2254(d)(2), (e)(1).[7]

[8] The reasons that the court *did* give for upholding Z's exclusion are misplaced and insufficient. Z's statement that he would impose the death penalty where the defendant would be likely to kill again did not exclude the possibility that Z would vote to impose the death penalty in other circumstances as well.[8] And the fact that Z

"stated unequivocally that she could impose the death penalty without demurrer." Dissent at 6757. In fact, juror Z's commitment to following instructions was far stronger than the juror improperly struck in *Gray*. When Z was asked if he could impose the death penalty, he responded with an unequivocal, "Yes, sir." When the juror in *Gray* was asked if she could vote for the death penalty, she responded only, "I think I could." *Gray*, 481 U.S. at 653 n.5.

[7] The dissent from denial also makes much of juror Z's indecisiveness, a term it uses repeatedly. According to the dissent, this indecisiveness connoted an "inability to properly follow the court's instructions and apply the law." Dissent at 6761. The state has never suggested this novel theory and we do not find it persuasive. If the juror in *Gray* was fit to serve despite her moral scruples against the death penalty, we see no basis for finding juror Z impaired because of his alleged "indecisiveness." Indeed, keeping an open mind as to whether the death penalty is appropriate, before any evidence has even been presented, strikes us as a virtue in a juror, not a basis for disqualification.

[8] Even after learning that life without parole was an alternative to the death penalty, Z unequivocally stated that he would be able to consider and impose the death penalty. The dissent from denial makes the following incorrect statement: "Although both defense and the prosecutor explained to him more than once during their voir dire questioning to qualify Juror Z that, if found guilty, Brown would never be released from prison, Juror Z's answers concerning his willingness to

impose death in conformance with Washington law were nonetheless confused." Dissent at 6759. Putting aside the fact that being "confused" is hardly the same as being unwilling to follow the court's instructions, juror Z in fact stated unequivocally and repeatedly that he could impose the death penalty. Rather than "[q]oting selective portions of [the] voir dire transcript," *id.* at 6762, as the dissent does, *see id.* at 6759-60 n.2, we provide the entire relevant transcript of the defense's voir dire:

Q. Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A. I did not until this afternoon.

Q. That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt. Do you think that you could consider both options?

A. *Yes, I could.*

Q. Could you give me an idea sort of [how] you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A. I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.

Q. Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A. *I believe so, yes.*

And here is the prosecutor's voir dire on this subject:

[Q.] I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you

find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A. I think I made that statement more under [the] assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q. And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing impose a death penalty since the person would be locked up for the rest of his life?

A. I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q. And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A. *Yes, sir.*

Q. So this idea of him having to kill again to deserve the death penalty is someone that you are not firm on, you don't feel that now?

A. I do feel that way if parole is an option, without parole as an option. *I believe in the death penalty.* Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but *I think in severe situations it's an appropriate measure.*

misstated the law means nothing: If all prospective jurors who did not fully understand the law before the trial began were struck, only lawyers would be allowed to serve on juries (and only a handful of lawyers at that).

[9] Z's temporary misunderstanding of the prosecution's burden of proof-he initially thought the prosecution needed to prove guilt "beyond a shadow of a doubt"-was also irrelevant; it would have been easily corrected by the jury instructions, which Z gave every indication he would follow. In fact, the prosecutor himself conceded he was unconcerned with Z's confusion on this point:

THE COURT: Counsel, any challenge to this

Q. But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A. *I could consider it, yes.*

Q. Then could you impose it?

A. *I could if I was convinced that was the appropriate measure.*

It is true, as the dissent suggests, that we owe the trial judge deference because of his ability to observe demeanor, but demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words. Here, juror Z's clear words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary. If appellate courts must defer to trial court findings on a transcript such as this because a witness may somehow have contradicted his spoken words through some unknown facial expression or body language, not only is *Witherspoon* a dead letter, but all substantial evidence review of trial court factual findings is obsolete.

particular juror?

[PROSECUTOR]: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard.

And when another juror expressed that she, too, thought the burden of proof was "to a point of a shadow of a doubt," the trial judge dismissed her confusion as unilluminating:

> She doesn't know technically what the definition of beyond a reasonable doubt is. I doubt that anybody in this room knows technically what beyond a reasonable doubt really means and even in your own mind. . . . I was not so concerned with her responses of beyond a shadow of a doubt or crystal clear. I think that definitely could fit within the definition of a reasonable doubt.

[10] Finally, Brown's failure to object to juror Z's removal at trial does not alter the *Witherspoon* error analysis in this case. Brown raised the juror Z claim on direct appeal, and the Washington Supreme Court did not find the claim to be waived or procedurally barred. Nor does appellee allege that the claim is waived or barred, or that it was not exhausted in state court.[9]

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[9] The dissent from denial makes much of a defense counsel's failure to object during voir dire to juror Z's dismissal. *See* dissent at 6755, 6756, 6762, 6767. According to the dissent, defendant's lawyer could not ethically object because even he must have recognized "that Juror Z was properly dismissed for cause." *Id.* at 6762. We find it hard to believe that our colleagues take such an ingenuous view of the realities of the courtroom. As the dissenters must surely understand, defense

11] In sum, excusing juror Z for cause was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal. *See* 28 U.S.C. § 2254(d)(1).[10]

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counsel declined to object because he was glad to get rid of juror Z. After all, Z had described himself as pro-death penalty, and reiterated numerous times, under oath, that he would be willing and able to impose the death penalty. Defense counsel must have thanked his lucky starts when the prosecutor bumped Z.

We know for a fact that the dissent's "scrupulous defense counsel" theory has no basis in reality. As the dissent recognizes, defense counsel did object vigorously to *juror Y's* dismissal for cause. *See* dissent at 6761-62. Juror Y, of course, was the one who had described the death penalty as "barbaric" and as "mak[ing] . . . brutes of us all," and had crossed her arms and held her hand up when asked by the court whether she could sentence anyone to death. *See* p. 6742 and no.4 *supra*. Y was a far better juror for the defense than Z, which is why defense counsel fought so hard to keep her on the jury and then to have her reinstated. But Y had also disqualified herself under *Witherspoon*. *See* p. 6742 *supra*. Under the dissent's contrived hypothesis, Brown's lawyer would have felt morally compelled to acquiesce in Y's dismissal.

Of course, the fact that Brown's attorney was glad to see juror Z go would seem to make the trial judge's error in this case harmless. But, as we explain below, *Witherspoon* error is structural. *See* section 3 *infra*.

[10] The dissent from denial intones the mantra of *Rice v. Collins*, 126 S. Ct. 969 (2006), but forgets that in *Collins*, the state trial court made a factual finding that the juror had been dismissed for race-neutral reasons, and the California Court of Appeal upheld the dismissal based on that finding. *See id.* at 973. The Supreme Court reversed us because we "improperly substituted [our] evaluation of the record for that of the state trial court." *Id.* That is not what happened here. The Washington Supreme Court in this case *applied the wrong*

standard with respect to juror Z; it nowhere found that juror Z could not follow his oath.

To compensate for the lack of a proper *Witherspoon* finding, the dissent would impute to the state trial court a finding it never made-one that it, indeed, could not have made on this record-by suggesting that the trial judge must have incorporated the prosecutor's objection: "Excusing Juror Z was based upon the prosecutor's sole reason underlying the objection-a finding that Juror Z could not follow his oath and faithfully apply Washington's capital sentencing law. . . ." Dissent at 6758. But the prosecutor's objection said nothing at all about juror Z's ability or willingness to follow the juror's oath. Here is exactly what the prosecutor said:

THE COURT: . . . .Counsel, any challenge to this particular juror?

[PROSECUTOR]: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

As can readily be seen, the prosecutor says nothing about the juror's oath or whether juror Z will follow it. Rather, the prosecutor concentrates (like the dissent) on the question of whether juror Z would be willing to impose the death penalty if the alternative were life without parole. And (like the dissent) he gets it wrong. *See* n.8 *supra*. The prosecutor's reason for striking juror Z comes only two pages after juror Z's statement, yet stands juror Z's words entirely on their head. If the trial judge uncritically incorporated the prosecutor's statement into

[12] 3. Having found that juror Z was erroneously excluded, it is unnecessary for Brown to

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his ruling, as the dissent suggests, the trial judge simply nodded.

The undisputable fact is there is nothing whatsoever in juror Z's voir dire that lends the least support for the finding-explicit or implicit-that he would not follow his oath. This is a juror who listed himself as pro-death penalty in his juror questionnaire and stated repeatedly under oath that he believes in the death penalty. He did not perhaps show the kind of bloodthirsty eagerness for its imposition that the prosecutor may have preferred-juror Z did say he "would have to give [the matter] some thought" and reserved the right to impose the death penalty only when he "was convinced [it] was the appropriate measure"-but there is nothing in his testimony that could remotely support the view that he would not faithfully follow the court's instructions. No degree of deference, nor allowance for facial expressions and demeanor, can possibly fill in what isn't there: the least indication that juror Z could not or would not follow the law. If it *were* there, we are confident the dissent would have quoted it.

Curiously, our dissenting colleagues themselves seem to be confused about Washington's death penalty jury instructions. The dissent states: "There is no question that the *aggravated circumstances* of this case-kidnapping, torture, and the sadistic murder of the victim-would clearly warrant application of the death penalty under Washington law." Dissent at 960 (emphasis added). Despite the law's insistence that juries consider only *mitigating* circumstances in deciding whether a defendant should be sentenced to death, *see* Wash. Rev. Code. § 10.95.060(4); *see also* p. 6740-41 *supra*, the dissenters are transfixed by the unquestioned heinousness of Brown's crime. *See* dissent at 6763; *see also id.* at 6755 ("The facts are sickening."). The dissent even states that "[t]he trial judge obviously had [the aggravated circumstances of this case] in mind when dismissing Juror Z. . . ." *Id.* at 6763. Were this true, of course, there would have been even more blatant *Witherspoon* error; nothing in *Witherspoon* allows a judge to take the atrociousness of the defendant's crime into account when deciding whether to dismiss a juror for cause.

demonstrate he was prejudiced by Z's exclusion. Prejudice is presumed. The Supreme Court has been equally clear on this point:

> [T]his Court in *Davis* surely established a *per se* rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause. . . .
>
> . . . The instant case presents yet another opportunity for this Court to adopt a harmless-error analysis and once again we decline to do so.

Gray, 481 U.S. at 659-60 (citing *Davis v. Georgia*, 429 U.S. 122, 123-24 (per curiam) (Rehnquist, J., dissenting)). Thus, Brown's death sentence cannot stand.[11]

Ineffective Assistance of Counsel

Brown's final claim is that his attorney provided ineffective assistance in various ways during the sentencing phase of his trial. Were we not granting habeas relief with respect to Brown's sentence for the reasons set forth above, this claim

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[11] We find no constitutional infirmity with Brown's conviction. *See Bumper v. North Carolina*, 391 U.S. 543, 545 (1968) (holding that *Witherspoon* error requires setting aside a death sentence, but is insufficient to require setting aside a conviction); *see also Gray*, 481 U.S. at 668 (finding that a juror was erroneously excluded from the jury in violation of *Witherspoon* and *Witt*, and holding that "[t]he judgment of the Supreme Court of Mississippi, *insofar as it imposes the death sentence*, is reversed" (emphasis added))

would merit significant attention. Should the state choose to seek the death penalty again on remand, however, Brown will have a new opportunity to receive effective assistance of counsel. We therefore need not reach this claim.

We also do not reach the newly certified issue subsumed within Brown's ineffective assistance of counsel claim-whether the district court erred by refusing to consider certain reports in its habeas evidentiary hearing. We are reversing the district court's decision regardless of whether it should have admitted the evidence.

* * *

We reverse the district court's judgment denying the writ of habeas corpus and remand for issuance of a writ with respect to Brown's sentence, unless within a reasonable time set by the district court the state conducts a new penalty phase trial or vacates Brown's death sentence and imposes a lesser sentence consistent with law.

REVERSED IN PART; REMANDED.

TALLMAN, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, CALLAHAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc:

Contrary to the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2241, *et seq.*), our court overturns a fitting punishment for a just aggravated murder conviction. To do it, our panel impermissibly substitutes its own evaluation of the trial judge's discretionary ruling to dismiss a

prospective juror for cause during jury selection in this capital case, notwithstanding the inherent limitations of a written transcript and the fact that defense counsel stated immediately before the court excused the prospective juror, "We have no objection." The opinion fails to give appropriate AEDPA deference to the determination of the Washington Supreme Court which approved the trial judge's reasonable and more informed approach to jury selection in qualifying the venire. I respectfully dissent from the denial of rehearing en banc.

Rice v. Collins, 126 S. Ct. 969 (2006), reiterates our limited role and authority under AEDPA by recognizing the need for highly deferential review of a trial court's decisions in jury selection because of the constraints of a printed record, which may not adequately portray what happened in the courtroom during voir dire. Even under the standard developed in *Gray v. Mississippi,* 481 U.S. 648 (1987), for reviewing jury selection in death penalty cases, we still must afford deference to the trial court's determination that a potential juror would be "substantially impair[ed in] the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 658 (quoting *Wainwright v. Witt,* 469 U.S. 412, 424 (1985)). The defense expressly declared that it had no objection when the prosecutor moved to dismiss the venireman for cause. Nor did the defense later ask the court to reconsider his dismissal as it did for another prospective juror, who was also excused from jury service for cause. Overturning the appropriate sentence in this heinous case is legally unwarranted and nonsensical.

I

The facts are sickening. Brown kidnaped at random a woman who had just finished her shift as a hotel desk clerk near the Seattle-Tacoma International Airport. He stripped, bound, and gagged her, then proceeded to rape, sodomize, and slowly torture her over a two-day period before killing her in a manner which was anything but quick and painless. He was captured in Palm Springs, California, where he had continued his sadistic crime spree by taking captive yet another victim. The Palm Springs victim escaped her bonds to summon police and lived to testify against Brown.

During jury selection in Washington's King County Superior Court an experienced trial judge dismissed a prospective juror, Juror Z, for cause after he equivocated on whether he could impose the death penalty in conformance with Washington law by suggesting that he thought the punishment should be limited to those cases where the defendant was likely to re-offend. Juror Z was examined about that view. After both sides took the opportunity to lead the venireman through the questioning of his views, and after the judge had also asked questions of him, the prosecutor challenged Juror Z's qualification to serve based on his erroneous beliefs about the death penalty under Washington law. The defense answered, "We have no objection." The trial judge then excused Juror Z for cause. On appeal, the Washington Supreme Court rejected the argument that Juror Z should not have been excused and affirmed the ruling of the trial court.

Our court's opinion labels the Washington Supreme Court's reasons for affirming the dismissal

"misplaced and insufficient." Opinion at 6746. But the panel determined solely by reading the transcript, and contrary to the findings of both state courts, that Juror Z was in fact able to follow the law and could impose the death penalty in proper situations. *Id.* at 6746, 6749-51. In doing so, our opinion erroneously holds that the Washington Supreme Court made a decision that was both contrary to clearly established federal law, as determined by the Supreme Court in *Gray,* and was based on an unreasonable determination of the facts in light of the record. *Id.; see* 28 U.S.C. § 2254(d). Yet to reach this result under AEDPA, the dismissal must have been both objectively unreasonable in that "the state court was not merely wrong, but actually unreasonable," *Taylor v. Maddox,* 366 F.3d 992, 999 (9th Cir. 2004), and the "state court [must have] confront[ed] a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrive[d] at a result different from [Supreme Court] precedent," *Williams v. Taylor,* 529 U.S. 362, 406 (2000). Neither is the case.

II

In *Gray,* the Supreme Court reversed a Mississippi Supreme Court decision which held that it was harmless error for a state court to dismiss a potential juror for cause after the juror said she could impose the death penalty notwithstanding her views in opposition to it. 481 U.S. at 667-68. The Court concluded that, unless "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath[,]" the trial court may not dismiss a potential juror in a death penalty case for

cause. *Id.* at 658 (internal quotation marks and citation omitted). This determination is not subject to harmless error review. *Id.* at 660.

Unlike here, the trial judge in *Gray* explicitly found that the potential juror, Mrs. H.C. Bounds, was capable of voting to impose the death penalty, but granted the dismissal anyway. *Id.* at 653-55. Bounds stated unequivocally that she could impose the death penalty without demurrer. *See id.* at 653 n.5. Nevertheless, even if Bounds had expressed hesitation, the Supreme Court held that a death penalty verdict must be vacated when "a potential juror, who has conscientious scruples against the death penalty but who nevertheless . . . is eligible to serve, has been erroneously excluded for cause." *Id.* at 659.

Still, under *Gray,* it is permissible to remove from the venire "those jurors who would frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Id.* at 658 (quoting *Wainwright,* 469 U.S. at 423)(internal quotation marks omitted). Since judges of the Washington Superior and Supreme Courts and a United States District Judge all found that Juror Z articulated an erroneous standard for imposing a sentence of death under state law, how can three federal judges on appeal now say, on this record, that it was objectively unreasonable for those courts to conclude that he could not follow the juror's oath? Excusing Juror Z was based upon the prosecutor's sole reason underlying the objection-a finding that Juror Z could not follow his oath and faithfully apply Washington's capital sentencing law. primarily because of his confusion and uncertainty, as reflected throughout

the entire voir dire, about when he should appropriately consider the death penalty.[1]

While our opinion cites to the guidelines set forth in *Gray*, it fails to accord those guidelines the AEDPA deference due to a state court's determination as to which jurors are "substantially impaired." On the record before our panel, the trial judge's dismissal of Juror Z could not be interpreted as "objectively unreasonable," nor is the factual situation in *Gray* sufficiently similar to conclude that the trial court's dismissal was contrary to the rule announced in *Gray*. The dismissal was simply a reasonable judgment call made by the only judge who actually saw and heard Juror Z during voir dire. There is no showing on the record that the trial judge or the Washington Supreme Court misapplied United States Supreme Court precedent. As the United States district judge so aptly observed in denying habeas relief on this ground, "Even if this Court would not have dismissed the jurors for cause, it cannot substitute its judgment for that of the state courts." Yet our panel does just that. The real question then is whether the Washington Superior and Supreme Courts made an objectively unreasonable determination of the facts in light of the record. They did not.

Juror Z stated several times that his ability to impose the death penalty was dependent on whether

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[1] What the prosecutor said to support the motion to excuse Juror Z was, in relevant part:

> I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

the defendant was likely to re-offend, which is not the standard for imposition of the death penalty in an aggravated murder case under Washington law. *See* WASH. REV. CODE § 10.95.060(4). Although both defense counsel and the prosecutor explained to him more than once during their voir dire questioning to qualify Juror Z that, if found guilty, Brown would never be released from prison, Juror Z's answers concerning his willingness to impose death in conformance with Washington law were nonetheless confused.[2] The trial judge explained

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[2] Defense counsel explained to Juror Z that the jury would consider two sentencing options should Brown be found guilty-life without parole and the death penalty. At this point, Juror Z stated that he could consider both options. However, Juror Z then explained that he believed the death sentence would be appropriate if a person "would be incorrigible and would reviolate if released." Defense counsel once again explained the idea of life without parole, and Juror Z again said he could consider both options.

Shortly thereafter, this exchange occurred between defense counsel and Juror Z:

> Q. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?
>
> A. I'm not sure.

Even after defense counsel explained that Brown would receive either life without parole or the death penalty if found guilty, and after Juror Z claimed he could consider both options, he still misstated Washington law. While the prosecutor was questioning Juror Z about his incorrect perception of the standard of review ("beyond a shadow of a doubt" instead of "beyond a reasonable doubt"), the following exchange occurred:

twice to potential jurors, prior to Juror Z's voir dire, that life without parole was an option that the jury

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> Q. So, I want to ask you, the thing that bothers me, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?
>
> A. I would have to know the, I'm at a loss for the words here.
>
> Q. You can ask me any questions, too, if you need some clarification.
>
> A. I guess it would have to be in my mind very obvious that the person would reoffend.

A little while later, the prosecutor once again explained that life without parole was a sentencing option should Brown be found guilty. The prosecutor asked, "[C]an you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?" Juror Z responded:

> "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole."

Contrary to the panel's assertion that Juror Z "unequivocally stated that he would be able to consider and impose the death penalty," Juror Z in fact exhibited quite a bit of confusion and equivocation through his uncertain answers as to when he would be willing to impose the death penalty. Juror Z saying in one breath that he could follow the law, and then in the next breath misstating the law, is not an unequivocal declaration that "he would be able to consider and impose the death penalty" as required under Washington law.

could consider.[3] However, even after multiple explanations by the judge, prosecutor and defense counsel, Juror Z did not grasp, nor could he be certain about, the appropriate circumstances in which as a juror he would consider imposing the death penalty. The prosecutor correctly summarized his answers, saying, "I think he is very confused about the statements. . . ." Juror Z stated at times that he could follow the law, but also stated he would "have to give it some thought" once he knew that Brown would not be paroled if found guilty. It was not unreasonable for the trial judge to conclude that, unlike juror Bounds in *Gray*, Juror Z was unfit to serve because of his indecisiveness, suggesting his inability to properly follow the court's instructions and apply the law.

Washington law does not ask the jury during the sentencing phase of a death penalty case to

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[3] On October 25, 1993, the trial judge instructed half the potential jury pool, including Juror Z, on Washington death penalty law. Specifically, the judge explained that the jury "would . . . retire to determine whether the death penalty should be imposed or whether the punishment should be life imprisonment without the possibility of parole." He further stated that, "[i]n making that determination, [each juror] would be asked the following question: Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

Furthermore, on November 3, 1993, when Juror Z was brought back for individual questioning, the trial judge informed all potential jurors that "[i]t is the State's burden to prove to [the jury] beyond a reasonable doubt the appropriate penalty, since there are only two penalties a jury could return, one is prison without the possibility of release or parole." He reiterated, "that literally means exactly that, a true life in prison without release or parole, or the penalty of death."

consider whether the defendant would re-offend. Instead, it asks the jury whether it is convinced "beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency[.]" WASH. REV. CODE § 10.95.060(4). This standard says nothing about proclivity to reoffend. It was not error for the judge to decide that Juror Z could not honestly abide by his oath to follow the law as instructed. The panel ignores the deferential AEDPA standard of review it must accord the Washington courts when it declares that any finding that Juror Z was impaired would be unreasonable.

III

Conspicuous by its absence is any motion by the defense during voir dire to challenge or reconsider the determination to remove Juror Z. Defense counsel did move in writing for reconsideration of the trial court's dismissal for cause of Juror Y, an attorney who had expressed strong reservations about the death penalty, although stating that she thought she could consider it if required. Brown filed his mid-voir dire motion to recall Juror Y or declare a mistrial and qualify a new jury panel because Brown felt that Juror Y was erroneously dismissed for cause. A few days later, Brown also filed a motion to reconsider the trial court's denial of challenges for cause regarding two other venireman who favored imposition of the death penalty. But there was no motion regarding Juror Z. Nor has Brown ever claimed defense counsel's actions during voir dire in letting Juror Z be excused from service constituted ineffective assistance of counsel.

Quite clearly those who had the opportunity to watch Juror Z's testimony, including the trial judge, the prosecution, and defense counsel, both during and after questioning him on voir dire, felt that Juror Z was properly dismissed for cause. Our panel nonetheless has held, after reviewing only the written record of Juror Z's oral voir dire, that such a determination is or would be objectively unreasonable. Given the substance of the entire record, and the constraints of our limited role as a federal habeas court, the panel has overstepped its authority under AEDPA. Congress surely intended through enacting AEDPA to end the practice by some federal judges of granting habeas relief to overturn state capital cases on rulings that even the parties did not urge to be erroneous when trying their case.

IV

Quoting selective portions of a voir dire transcript to support a particular view of the trial court's performance ignores the reality of jury selection. The voir dire process is far more complex than a simple reading of a transcript. In some cases, it will be crystal clear that a particular venireman is eligible to serve on a jury, but this is not one of those cases. Experienced trial lawyers know that there are intangible factors that influence the decision to accept or reject prospective jurors which cannot be reduced to written text in a cold record. There is no question that the aggravated circumstances of this case-kidnaping, torture, and the sadistic murder of the victim-would clearly warrant application of the death penalty under Washington law. The trial judge obviously had this in mind when dismissing Juror Z after his repeated statements that he would impose the death penalty only if convinced that

Brown would likely re-offend, a condition Washington law does not require to impose a sentence of death.

Juror Z wavered back and forth between claiming to understand what he was being told about when the Washington capital sentencing law applied, yet he reiterated his erroneous belief that death was applicable only for recidivists. The transcript reflects that he seemed easily led by both the prosecution and defense counsel into declaring an understanding that everyone in the courtroom recognized he simply did not have. This is why deference to the trial court and the fact that neither party wanted this juror are important considerations in applying AEDPA's "objectively unreasonable" standard of review. A trial judge will note pauses, hesitations, and non-verbal expressions (body language) that will factor into his decision to dismiss a potential juror:

> The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror.

State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991), *quoting* 14 L. Orland & K. Tegland, WASH. PRAC.. *Trial Practice* § 202, at p. 332 (4th ed. 1986). In denying Brown's motion to reconsider dismissing for cause Juror Y, the trial judge explained how he analyzed potential jurors to determine whether they are substantially impaired:

> [T]here is not any one particular response from any one of these jurors I think that is definitive for the most part. It's more of a total overall impression from everything that they have said. With [Juror Y] I guess what was most convincing was her body posture, the things that were unsaid because of the fact of the way she crossed her arms, sat back and what she was telling us at that point in time.

The "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism," *Wainwright*, 469 U.S. at 424, yet our *Brown* panel does just that. Rather than respecting the trial judge's more informed interpretation of Juror Z's demeanor, tone, and words, our panel substitutes its view, based solely on the written record, to form its own interpretation. There is a reason AEDPA requires that appellate courts give appropriate deference to trial courts during voir dire:

> Despite [the] lack of clarity in the printed record ··· there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 425-26. This case trenchantly illustrates the need for such deference.

Rice v. Collins reiterates that such deference is required when a trial court finds cause for juror bias. In *Collins*, the petitioner brought a *Batson* challenge to a peremptory strike of a young African-American woman, Juror 16, who the prosecutor

believed did not have sufficient ties to the community because of her youth, and who may have been too tolerant of the crime with which the respondent was charged. 16 S. Ct. at 973. The California Court of Appeal upheld the trial court's ruling on the peremptory challenge to credit the prosecutor's race-neutral explanations for striking Juror 16. *Id.* The district court dismissed Collins's habeas petition with prejudice. *Id.* We reversed, concluding that the state appellate court made an unreasonable factual determination in crediting the prosecutor's race-neutral reasons for striking Juror 16. *Id.*

In a unanimous decision, the Supreme Court reversed us. It held that, although we recited the proper standard of review under 28 U.S.C. § 2254(d)(2), "the panel majority improperly substituted its evaluation of the record for that of the state trial court." *Id.* "State-court factual findings . . . are presumed correct [and] the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.* at 974 (quoting 28 U.S.C. § 2254(e)(1)). Juror 16 replied affirmatively when asked whether she believed that the crime with which the respondent had been charged should be illegal, and disclaimed any other reason she could not be impartial. *Id.* at 975. However, the Court determined that even if "the prosecutor [still] claimed to hold [race-neutral] concerns despite Juror 16's voir dire averments[, this] does not establish that she offered a pretext." *Id.* In other words, the prosecutor did not have to accept the voir dire statements of Juror 16 when there were other race-neutral grounds for the peremptory challenge.

Here, the *Brown* panel seizes upon Juror Z's

statement that he would be able to consider the option of the death penalty as a basis for its determination that the prosecutor's reason for striking Juror Z, and the trial court's willingness to credit that reason, was objectively unreasonable. But Juror Z's willingness to impose the death penalty was accompanied by his indecisiveness and an expressed viewpoint which, if followed, would result in the misapplication of Washington law. Rather than examining piecemeal the individual statements of Juror Z, the trial judge could appropriately consider Juror Z's inconsistent statements and his uncertainty as reflected throughout the entire voir dire process as a reasonable basis for his exclusion. Under *Collins,* the trial judge did not have to accept Juror Z's isolated declarations that he could follow the law if the totality of Juror Z's voir dire examination reflected his general confusion and indecisiveness about the proper application of the death penalty.

"Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.* at 976. Although some might find that Juror Z had eschewed and rejected his prior improper basis for application of the death penalty, a reasonable mind could just as easily find that he *had not* eschewed and rejected that basis. The trial judge, as trier of fact on challenges during voir dire, is entitled to the same latitude as a jury determining the credibility of trial witnesses when judging whether a potential juror is able to serve. The superior court judge had the responsibility of weighing Juror Z's various inconsistent statements to determine Juror Z's true

ability to faithfully perform his duties as a juror by applying Washington law. He had the opportunity to watch the prospective juror testify; we did not.

V

Finally, the Washington Supreme Court need not *explicitly* declare that Juror Z was "substantially impaired" for its affirmance to count under AEDPA. True, the appellate court did not incant the words "substantially impaired." But based upon the rulings of both the trial and appellate courts, and the record in this case, we can certainly conclude that the Washington courts found appropriate the decision to excuse Juror Z on the only ground proffered by the prosecutor-that he could not discharge his oath as a juror to follow state death penalty law. While the record may be susceptible to different interpretations by reasonable jurists, AEDPA demands that we must be able to conclude that the decision was "objectively unreasonable" to grant relief. That standard is simply not met here.

By listening to the voir dire statements of Juror Z, watching how he answered specific questions during voir dire, considering the prosecutor's reason for wanting to dismiss Juror Z for cause, and hearing the defense state that it had no objection to the motion, the trial judge implicitly found that Juror Z was "substantially impaired" by excusing him for cause. Nothing more is required. *See Wainwright,* 469 U.S. at 430. The Supreme Court in *Wainwright* said that in making rulings on voir dire objections, the judge is not "required to announce for the record his conclusion that [the potential juror] was biased, or his reasoning," when "[t]he finding is evident from the record." *Id.* It is

especially telling when the defendant does not object to the dismissal, as was the case when Brown's lawyer rose before the court and expressly stated that she had no objection to excusing Juror Z.

We must afford the same presumption of correctness to the Washington Supreme Court in reviewing the trial court's factual determination of juror bias. *See Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990) ("Even though the state appellate court is, in a sense, in no better position than we are to evaluate the state trial court record, [the habeas statute] requires us to accord the same presumption of correctness to its factual findings."). Specifically, the Washington Supreme Court concluded in reference to Juror Z's voir dire:

> Appellant did not object at trial to the State's challenge of [Juror Z] for cause. At any rate,[Juror Z] was properly excused. On *voir dire* he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing [Juror Z] for cause.

Washington v. Brown, 940 P.2d 546, 585 (Wash. 1997).

Whether or not the Washington Supreme Court intoned the magic words, "substantially impaired," it affirmed the trial court because of Juror Z's erroneous belief about when the death penalty should be applied under Washington law. By doing

so, it impliedly determined Juror Z would be substantially impaired in his duties as a juror to follow the law by holding that he was properly dismissed for cause.

VI

This opinion unfairly rids the trial court of the discretion it must necessarily possess in determining juror bias in death penalty cases. Ostensibly, *Brown* stands for the proposition that if the written record is not absolutely and explicitly clear as to whether a dismissed juror could not correctly deliberate on imposition of the death penalty, we must vacate the death sentence if that juror was nonetheless dismissed by the judge who watched him respond to the questions on voir dire without defense objection. That is simply not the way the Supreme Court has directed us to review jury selection under AEDPA, even after *Gray*. *See Collins*, 126 S. Ct. at 973-75; *supra*, § IV. Indeed, *Wainwright* declared prior to *Collins* that deciding to dismiss a potential juror "does not require that a juror's bias be proved with unmistakable clarity." 469 U.S. at 424 (internal quotation marks omitted). While we do not and will not rubber stamp on habeas review juror dismissals in death penalty cases, AEDPA surely requires more deference to the Washington courts than that paid by our court in this one.

Finally, this opinion impermissibly lowers the level of deference which comity demands that we as a federal habeas court afford state courts in reviewing their decisions and findings of fact. *Brown's* lower standard of "reasonableness review" severely handicaps a trial judge's ability to go beyond the scope of mere words and phrases taken piecemeal

from the entire voir dire process. This new standard ignores the need for litigants and the trial judge to interpret the prospective venireman's answers, considering them along with body language and demeanor. Because AEDPA, as reinforced by the Supreme Court, commands greater comity when federal courts review these kinds of practical decisions by experienced state judges in capital cases, I respectfully dissent from our court's unwillingness to rehear this case en banc.

United States District Court

WESTERN DISTRICT OF WASHINGTON

CAL COBURN BROWN

v.

JUDGMENT IN A CIVIL CASE

JOHN LAMBERT

CASE NUMBER: C01-715C

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT Petitioner's Amended Petition for Writ of Habeas Corpus is DENIED in its entirely.

September 16, 2004

BRUCE RIFKIN

Clerk

s/L. Simle

By, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAL COBURN BROWN Petitioner, v. JOHN LAMBERT, Respondent.	Case No. C01-715C ORDER

INTRODUCTION

This matter comes before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. No. 56). The Court has considered the Petition and Answer (Dkt. No. 60), in addition to Petitioner's and Respondent's Closing Arguments and Reply Briefs (Dkt. Nos. 148-49, 152, 154), and the balance of the record. For the following reasons, Cal Coburn Brown's Petition for Writ of Habeas Corpus is hereby DENIED in its entirety.

BACKGROUND

Petitioner is currently in the custody of the Washington Department of Corrections pursuant to his December 10, 1993 conviction and January 28, 1994 sentence of death for the aggravated first degree murder of Holly Washa. The events giving rise to Petitioner's conviction are lengthy and involve incidents involving two women in both Washington and California.[1] The facts, as in all death penalty

[1] In addition to Ms. Washa, the facts also refer to Ms. Susan Schnell, whom Petitioner assaulted in California. It was

cases, are gut-wrenching and gruesome. On one hand a repetition of these details seems unnecessary, and indeed inflammatory, since a more thorough recitation of the facts can be found in *State v. Brown*, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998), and since this Court's analysis focuses more on the state court's application of the law than on any factual issue. However, the Court finds that it is necessary to relate the details of Petitioner's crimes here as they provide the necessary backdrop for several of Petitioner's claims, particularly his ineffective assistance of counsel claim. The Court thus includes the following description of Petitioner's crimes, as recounted by the Washington Supreme Court:

> On May 27, 1991, Memorial Day, King County police, following a telephone call from police detectives in Palm Springs, California, discovered the body of a twenty-one-year-old woman, Ms. Holly C. Washa, in the trunk of her 1985 blue Oldsmobile automobile parked in space 266 of a Budget Park and Ride lot near the Seattle-Tacoma Airport. She was wearing a leather jacket covered with blood, and the strap of her purse was tied and knotted tightly around her neck. The strap was sunken into the cavity of a deep slash wound across her neck.
>
> [...]

Ms. Schnell's call to the Palm Springs police that was instrumental in Brown's arrest and subsequent confession as it relates to Ms. Washa. The facts, as they relate to Petitioner's connection to Ms. Schnell, are omitted from this Court's discussion.

[Appellant Brown's] Statement to Police

On May 27 and 28, 1991, Appellant made statements to police detectives in Palm Springs, California in three interviews which were recorded without his knowledge. In his statements he related in calm, deliberate, clear, graphic and specific detail a narrative of his activities, with few questions from the detectives, who courteously allowed him to relate his story. [Footnote omitted.] His statements may fairly be characterized as admissions or confessions. [Footnote omitted.]

On the morning of May 23, 1991, Ms. Holly C. Washa was at the Wyndham Garden Hotel near the Seattle-Tacoma Airport where she had just quit her part-time job. As she was driving out of the parking lot in her 1985 Oldsmobile, Appellant pointed to one of the tires on her automobile suggesting something was wrong. She stopped. Appellant then forced then forced his way into her automobile, stuck a knife [footnote omitted] in her face, and grabbed her by the hair. He demanded that she "drive or die," and began rummaging through her purse for money. Finding only a small amount of change, he looked at her checkbook. He then forced her to write a check for $350.00, the entire balance in her checking account. They went through the drive-up window at a Seafirst Bank in Federal Way and cashed the check. Then they went to the Seattle waterfront area where Appellant tied Ms. Washa's hands behind her back with her purse strap and forced her into the passenger seat of her automobile. He asked

her several questions concerning her schedule on a typical day, who her roommates were and what they did. [Ex. 89, tape 1, side 2.] He then purchased some handcuffs at a gun shop while leaving Ms. Washa tied up in the automobile. [Ex. 89, tape 2, side 1.]

After purchasing the handcuffs, Appellant took Ms. Washa back to his room at the Shadow Motel where he paid for an extra night. He demanded that she remove all her clothing, after which he tied her to the bed with his neckties and her purse strap. He cut up her shirt and stuffed it into her mouth for a gag. He then ordered her to get dressed again and took her to get something to eat. While at a Burger King drive-through, he held the knife in a threatening position where she could see he might use it. Upon their return to the motel room, he ordered her to remove her clothing and lie face down on the bed. He also told her not to scream or do anything. Appellant said Ms. Washa began fellating him, which he took as her consent for sexual activity. [Ex. 89, tape 1, side 2.]

Appellant then engaged in sexual intercourse with Ms. Washa for about two hours, during which time he noticed she was looking at the door and possibly thinking of escape. Appellant decided it was time "to have a little control, . . . make her a little more scared of me, basically." He then tied her in a face up, spread eagle position, with her hands behind her back and her mouth gagged, and whipped her "maybe half a dozen times. . . ." [Ex. 89, tape 2, side 1.]

Appellant allowed Ms. Washa to get dressed again, tied her hands behind her back, and drove her to Federal Way for pizza. When they returned to the motel, Appellant again forced her to undress and tied her to the bed in a face down, spread eagle position with her hands tied behind her back. He then had sexual intercourse with her again. At about 11:00 p.m. that evening, he telephoned Ms. Susan J. Schnell in California to reconfirm their weekend plans in Palm Springs. After that, he crawled into bed with Ms. Washa, who was still bound and gagged, and they "dozed." [Ex. 89, tape 2, side 1.]

The next day, Friday, May 24, 1991, Appellant forced Ms. Washa to drive him to her apartment where he hoped to find checks belonging to her roommates that he could forge. He found some checks and attempted to cash them in $500.00 amounts, but was thwarted when the banks wanted to compare signatures with signature cards on file. Appellant became irritated with Ms. Washa when the check-cashing plan did not go as he had hoped. She began to drive somewhat erratically, making him even angrier. [Ex. 89, tape 2, side 1.]

When they returned to the motel, Appellant again tied Ms. Washa to the bed face down in a spread eagle position with her hands handcuffed behind her back and her mouth gagged with a washcloth. He penetrated her vaginally and anally with an aftershave lotion bottle. [Ex. 89, tape 2, side 2.] He shaved her pubic hair and held a hot hair dryer close to

her vagina, breasts and stomach. He also shocked her by using an electric extension cord with the end cut off. He described these acts as "torture" and acknowledged that the electric shock was particularly painful. [Ex. 89, tape 1, side 2.]

At 8:45 on the evening of May 24, 1991, Appellant left for the Seattle-Tacoma Airport to embark on his trip to California. He forced Ms. Washa into the trunk of her blue 1985 Oldsmobile automobile with her hands handcuffed behind her back and drove to the Doug Fox Travel Agency parking lot where he momentarily parked the automobile. Because shuttle buses were driving around the lot, Appellant was concerned that someone might discovery Ms. Washa since "she could just bang and clang and crunch and scream and be out very quickly." [Ex. 89, tape 2, side 1.] He then went to the trunk and cut her throat with "three swipes" and stabbed her several times in the chest and abdominal areas. [Ex. 89, tape 3, side 1.] Because Ms. Washa's blood began leaking from the trunk of the automobile, Appellant moved from the Doug Fox lot to the Budget Park and Ride lot near Shumsky's Restaurant in the airport area. He told detectives:

> I was going to do her at one place and leave here there and the blood started coming out from underneath the car. . . . So I panicked and left that place and drove around to a different place . . . with all the rain and stuff it would just wash away and it wouldn't show.

[Ex. 89, tape 1, side 2.]

Appellant told detectives he killed Ms. Washa because he did not want to leave any witnesses alive. He also told them he kidnapped her because he needed money to get to California and "didn't like the idea of waltzing into a bank with my face, you know, all over the place." He also stated he was "going to rob somebody and let 'em go but then I just realized . . . after I did it that it would just be the same as waltzing into a bank and have my picture taken." [Ex. 89, tape 1, side 2.]

Appellant also told his Oregon parole officer, Larry Wibbenmeyer, in a telephone conversation on May 28, 1991 that he took Ms. Washa's life at the last minute. He described his actions as resulting from "panic."

Events in California

[...]

After being processed by the Palm Springs police, Appellant was interviewed by Detective Mark Harvey and his partner, Detective Al Franz. Three interviews took place between May 27 and May 28, 1991, with the first two initiated by the detectives and the third initiated by Appellant. Before each interview, Appellant was read his *Miranda* rights, stated he understood them, and agreed to talk with the detectives. Each interview was tape recorded without Appellant's knowledge or consent. During the first interview, Appellant in specific detail admitted his attack upon Ms. Schnell. Later in that interview, he admitted

killing Ms. Washa before coming to Palm Springs. He told the detectives where the killing took place in Washington and where Ms. Washa's automobile could be found. The Palm Springs police immediately contacted King County police who dispatched local officers to the Budget parking lot near the Seattle-Tacoma Airport where they located the 1985 blue Oldsmobile in space 266 with Ms. Washa's body in the trunk. Appellant still had the keys to Ms. Washa's automobile in his possession. [...]

Corroborating Evidence

King County Medical Examiner Donald T. Reay, M.D. performed an autopsy on Ms. Holly C. Washa. He concluded her death was caused by an extensive incised wound to her neck and strangulation by a ligature with a very rigid knot. He also noted that both stabbing and slicing occurred in the throat, requiring at least two motions to inflict the incised wound. It was his opinion that the hemorrhages in her eyes indicated the strangulation occurred first.

In addition to the lethal injuries, Dr. Reay described other trauma to Ms. Washa's body. Her pubic hair had been shaved. Her face was severely bruised. Both the insider and outside of her vaginal area were bruised. There was also bruising around her anus. The vaginal and anal injuries indicated forcible penetration with a hard object consistent with an aftershave bottle belonging to Appellant found in his Palm Springs hotel room. Her nipples showed abrasions and a linear pattern

of bruising consistent with being whipped by a belt or cord. Similar bruising was found on her inner thigh, which also indicated whipping. Her feet and ankles were covered with bruises consistent with having been restrained. Her chest and abdomen had multiple stab and slicing wounds. An "irregular blemish-like area of red drying" on her inner thigh indicated burning. The stab wounds were consistent with the knife blade of the Leatherman tool Appellant had in his pocket when he was arrested. [FN 17]

> FN 17. The State also presented corroborating witness testimony and physical evidence. *See* Br. Of Resp't at 24-27.

Appellant was charged by information on June 11, 1991 in the King County Superior Court with aggravated murder in the first degree. He was arraigned on February 26, 1992. A notice to determine whether the death penalty should be imposed was filed on March 24, 1992. He was tried by jury before the Honorable Ricardo S. Martinez. The trial began with jury selection on October 25, 1993. Guilt phase testimony began on November 30, 1993. On December 10, 1993, the jury returned a verdict of "guilty" of premeditated murder in the first degree, finding that Appellant committed the murder to conceal commission of a crime or to protect or conceal his identity; and found aggravating circumstances of robbery in the first or second degree, rape in the first or second degree and kidnapping in the first degree. The penalty

> phase of the trial began on December 15, 1993, and on December 27, 1993, the jury returned a verdict finding there were not sufficient mitigating circumstances to merit leniency. The trial court on January 28, 1994 imposed upon Appellant a sentence of death.

State v. Brown, 940 P.2d 546, 555-59 (Wash. 1997).

The Washington Supreme Court denied both Petitioner's post-conviction appeal and personal restraint petition ("PRP"). *See Id.*; *In re the PRP of Brown*, 21 P.3d 687 (Wash. 2001). Turning to federal court, Petitioner filed his original petition for writ of habeas corpus under 28 U.S.C. § 2254 on June 13, 2001 (Dkt. No. 8) and filed an amended petition on July 15, 2002 (Dkt. No. 56). The Court held an evidentiary hearing on November 3 and 4, 2003, on Petitioner's claim of ineffective assistance of counsel at the sentencing phase of the trial. Briefing is now complete and Petitioner's habeas petition is ready for review.

GROUNDS FOR RELIEF

Brown sets forth eight grounds for relief in his amended habeas petition. He formulates his claims as follows:

> (1) The Washington death penalty statute, Wash. Rev. Code § 10.95.010 (2000), *et seq.*, on its face and as authoritatively construed by the Washington Supreme Court in this case violates the Eighth and Fourteenth Amendments to the United States Constitution.
>
> (2) The Washington death penalty statute is vague on its face and violates the Eighth

Amendment and the Due Process Clause of the Fourteenth Amendment.

(3) As construed by the Washington Supreme Court in this case, the Washington death penalty statute violates the Eighth Amendment and the Ex Post Facto Clause of the United States Constitution.

(4) Petitioner was denied due process under the Fourteenth Amendment when a critical portion of the trial transcript was lost before Petitioner's direct appeal.

(5) Petitioner's confession was obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(6) Petitioner's jury was selected in violation of the due process clause of the Fourteenth Amendment.

(7) Withdrawn by Petitioner.

(8) Petitioner was deprived of his Sixth Amendment right to the effective assistance of counsel at the sentencing phase.

(9) Withdrawn by Petitioner.

(10) The Washington procedures for seeking post-conviction relief, as they were administered by the Washington Supreme Court in this case, failed to comport with the minimum requirements of due process of law.

(Am. Pet. At Dkt. No. 56)

DISCUSSION

Exhaustion of State Remedies

In order to present a claim to a federal court for review in a habeas corpus petition, a petitioner must first have presented that claim to the state court. *See* 28 U.S.C. § 2254(b)(1). The parties do not dispute that Brown properly exhausted his available state remedies by fairly presenting the eight claims to the Washington Supreme Court as federal claims. (*See* Answer at 16) The Court will thus examine all of Petitioner's alleged grounds for relief.[2]

Standard of Review

"Principles of comity and federalism counsel against substituting our judgment for that of the state courts." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). The deference referenced in this statement is embodied in the requirements of the federal habeas statute, as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Id.* Accordingly, under AEDPA, a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is *contrary* to, or involved in *unreasonable application of*, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d) (emphasis added). Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529

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[2] The Court also notes that the parties have stipulated that Petitioner timely filed his habeas petition within AEDPA's one-year statute of limitations. (*See* Stipulation at Dkt. No. 26.)

U.S. 362, 403-05 (2000). Under the "reasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The opinions of this Court regarding the death penalty are irrelevant to the analysis of Petitioner's claims.

The Supreme Court recently refined the Ninth Circuit Court of Appeals' interpretation of the phrase "unreasonable application." In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Supreme Court held that the Ninth Circuit has interpreted the phrase too broadly, as being synonymous with "clear error." The Court reasoned:

> These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. *It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a firm conviction" that the state court was "erroneous."* [...] [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *Rather, that application must be objectively unreasonable.*

Id. at 68-69 (emphasis added; internal citations omitted). Thus, the Supreme Court has clarified that federal courts should be even more deferential to state courts than the Ninth Circuit had previously

determined. *See Hall v. Dir. Of Corrs.*, 343 F.3d 976, 986 (9th Cir. 2003) (Tallman, J., dissenting). A state court decision may be overturned *only* if the decision is "objectively unreasonable," which means something more than merely "incorrect or erroneous." *Riley v. Payne*, 352 F.3d 1313 (9th Cir. 2003).

In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). The "unreasonable determination" clause usually applied to situations where petitioner challenged the state court's findings based entirely on the state court record. *Taylor*, 366 F.3d at 999 (internal citations omitted). "Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, that the process employed by the state court is defective, or that no finding was made by the state court at all." *Id.* Once the state court's fact-finding process survives this intrinsic review, the state court's findings are "dressed in a presumption of correctness, which then helps steel them against any challenge based on extrinsic evidence, i.e., evidence presented for the first time in federal court." *Id.* The burden is on the petitioner to rebut the presumption of correctness by clear and convincing evidence. *Sumner v. Mata*, 455 U.S. 591 (1982); 28 U.S.C. § 2254(e)(1).

Finally, relief may be granted on a federal habeas corpus petition only if the state court error caused "actual prejudice" or had a "substantial and injurious effect or influence" in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In other words, relief may not be granted

if petitioner merely shows that there is a reasonable possibility that the error contributed to the verdict. *Id.*

Petitioner's First Three Grounds for Relief: Constitutionality Issues

Petitioner's first three claims all allege that the Washington Death Penalty Statute, Wash. Rev. Code § 10.95.010, *et seq.*, violates various constitutional rights. In understanding these claims, an introduction to Eighth Amendment[3] Jurisprudence is useful.

At a minimum, states must properly establish a threshold below which the death penalty cannot be imposed. *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (2004) (citing *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987)). First, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). The intent is to "minimize the risk of wholly arbitrary and capricious action." *Zant*, 462 U.S. at 874 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). Second, "[s]tates must ensure that capital sentencing decisions rest on [an] individualized inquiry, under which the character and record of the individual offender and the circumstances of the particular offense are

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[3] The Eighth Amendment prohibits "cruel and unusual punishments" and is applied to the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. VIII; *Robinson v. California*, 370 U.S. 660, 667 (1962).

considered. *Romano*, 512 U.S. at 7 (citing *McCleskey*, 481 U.S. at 303). The sentencer must be allowed to consider any relevant information offered by the defendant. *Id.* Within these limits, however, states "enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 300 (1990). This latitude extends to evidentiary rules at sentencing proceedings. *Romano, supra*, at 7. Finally, "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Id.* at 8 (citing *California v. Ramos*, 463 U.S. 992, 1008 (1983)).

The United States Supreme Court classifies state death penalty statutes as either "non-weighing" or "weighing" depending on the process by which the sentencer considers or weighs a variety of factors in deciding whether to impose the death penalty. *See Williams v. Calderon*, 52 F.3d 1465, 1478 nn.11-13 (9th Cir. 1995), *cert. denied*, 516 U.S. 1124 (1996). In *State v. Brown* the Washington Supreme Court held that Washington is a non-weighing state. 940 P.2d at 591-92. In the penalty phase of a capital murder trial in Washington, the jury is asked a single question which is, "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient circumstances to merit leniency?" *See* Wash. Rev. Code § 10.95.060(4). All manner of collateral crimes evidence is admissible during the penalty phase. *See State v. Brown*, 940 P.2d at 592 (citing Wash. Rev. Code § 1095.060; Wash. Rev. Code

§ 10.95.070; *State v. Jeffries*, 717 P.2d 722 (Wash. 1986); *State v. Mak*, 718 P.2d 407 (Wash. 1986)).

In his first ground for relief, Petitioner argues that the Washington Death Penalty Statute on its face and as authoritatively construed by the Washington Supreme Court in this case violates the Eighth and Fourteenth Amendments because it is "devoid of meaningful guidelines and standards for the sentencer to apply in determining whether the sentence should be life imprisonment or death." (Am. Pet. At ¶ 1.1.) Petitioner makes this argument on the basis that the jury is given no guidance as to how the collateral evidence factors into their deliberations. No such guidance is required by law.

A statute identifying aggravating circumstances need not also provide standards to govern the jury in weighing the significance of those circumstances. *Zant*, 462 U.S. at 880. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994). There is simply no support for Petitioner's argument that "meaningful guidelines and standards" instructing jurors how to weigh collateral evidence are required to pass constitutional muster. Accordingly, Petitioner's first ground for relief is hereby denied.

Petitioner's second ground for relief states that the Washington Death Penalty Statute is vague on its face and violates the Eighth and Fourteenth Amendments because Wash. Rev. Code § 10.95.060(3) allows evidence of defendant's previous criminal activity without defining the word "previous." To wit, Petitioner argues "previous"

could mean either crimes occurring before the crime of conviction or it could mean crimes occurring before the penalty phase of the capital trial. Petitioner's argument is based on the fact that in the penalty phase of the Petitioner's trial, the jury was told that it could consider evidence of an attempted murder in California in deciding whether or not to impose the death sentence. The California attempted murder occurred after the crime that Petitioner was convicted of in this case.

The Washington Supreme Court held that the statute was not unconstitutionally vague. *In re PRP of Brown*, 21 P.2d page, 701-03 (2001). In his PRP, however, Petitioner took issue with the word "relevant" in Wash. Rev. Code. § 10.95.070(1).[4] The Court held that the statute was not vague because it lists eight factors for a sentencing jury to consider in deciding whether leniency is merited. *In re PRP of Brown*, 21 P.2d at 702. Petitioner's formulation of his claim is slightly different in his federal habeas petition. Instead of the word "relevant" he identifies the word "previous" as vague. This change in argument is likewise unavailing.

Petitioner's criminal record is admissible during the penalty phase of a capital trial. *See Tuilaepa v. California*, 512 U.S. 967, 978 (1994) (stating "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's

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[4] Wash. Rev. Code § 10.95.070(1) states in pertinent part "[i]n deciding the question posed by [Wash. Rev. Code] § 10.95.060(4), the jury . . . may consider any relevant factors, including but not limited to the following: (1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity."

prior criminal record in making its sentencing determination."). In fact, even unadjudicated criminal conduct may be introduced to support an aggravator factor such as probably future violence. *Campbell v. Kincheloe*, 829 F.2d 1453, 1461 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). The evidence of the attempted murder in California, therefore, was admissible evidence, whether it occurred before the crime of conviction or before the penalty phase of the capital trial. Petitioner's argument that "previous" should specify which of these time periods is the relevant time period for considering the admissibility of a defendant's prior criminal record is simply splitting hairs. Since Washington's Death Penalty Statute complies with Supreme Court precedent, Petitioner's second ground for relief is also denied.

In his third ground for relief, Petitioner argues that, as construed by the Washington Supreme Court in this case, the Washington Death Penalty Statute violates the Eighth Amendment and Ex Post Facto clause of the United States Constitution. Petitioner argues that following his conviction and sentence, the Washington Supreme Court construed the word "previous" in Wash. Rev. Code § 10.95.060(3) to mean prior to the date of the penalty phase of Petitioner's capital trial.

In *Rogers v. Tennessee*, the Supreme Court affirmed that the Ex Post Facto Clause "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of the government." 532 U.S. 451, 456 (2001) (quoting *Marks v. United States*, 430 U.S. 188, 191 (1977)). As Respondent correctly points out, petitioner's ex post facto claim fails as a matter of

law. In the same opinion, the Supreme Court also observed that "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process," however, due process does not incorporate the specific prohibitions contained in the Ex Post Facto Clause. *Id.* at 456, 458-59. Instead the focus of a due process analysis is on "the right to fair warning as those concepts bear on the constitutionally of attaching criminal penalties to what previously had been innocent conduct." *Id.* at 459. Accordingly, the Supreme Court has held that retroactive judicial expansion of a criminal statute violates due process only when the state court's prior opinions had not given the "slightest indication" that the person's conduct violated the law. *Id.*

In response to this claim for relief, the Washington Supreme Court held:

> [Brown] claims a sentencing jury cannot consider his California convictions of August 30, 1991 as "prior criminal activity" under [Wash. Rev. Code] § 10.95.070(1) because those convictions occurred after the crime for which he was convicted in King County was committed on May 24, 1991. Nothing in [Wash. Rev. Code § 10.95.070(1) indicates a sentencing jury may only consider convictions occurring prior to the date of the crime for which defendant is being tried. It is sufficient that the prior conviction be established prior to conclusion of the case before the court.

In re PRP of Brown, 21 P.3d at 698. There was plenty of indication that the state court would interpret the statute in this manner. Indeed, construed in conjunction with Wash. Rev. Code §

10.95.070(8),[5] Petitioner had fair warning the evidence of the attempted murder in California would be deemed admissible. The Court finds that the state court decision was neither contrary to, nor an unreasonable application of, clearly established federal law. Petitioner's third ground for federal habeas relief is hereby denied.

Petitioner's Fourth Ground for Relief: Lost Trial Transcript

Petitioner asserts that he was denied due process under the Fourteenth Amendment when an allegedly critical portion of the trial transcript was lost before Petitioner's direct appeal. His argument is supported by the following facts. The trial court held a series of pre-trial hearings under CrR 3.5 and the Washington Right of Privacy statute, Wash. Rev. Code § 9.73, *et seq.*, to determine the admissibility of the secretly tape recorded interviews. (SR 5572-73.) The first hearing took place in July 10, 1992. (*Id.*) Palm Springs Detective Mark Harvey testified at that hearing. (*Id.*) There is no verbatim report of proceedings of the July 10 testimony, due to the failure of the court reporter to find his notes of that hearing. (*Id.*) Upon order of the Washington State Supreme Court, the trial court presided over the preparation of a supplemental report of proceedings.

Petitioner objects that the supplemental report of proceedings provided an inadequate record

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[5] Wash. Rev. Code § 10.95.070(8) states in pertinent part "[i]n deciding the question posed by [Wash. Rev. Code] § 10.95.060(4), the jury . . . may consider any relevant factors, including but not limited to the following: (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

for appeal.[6] Specifically, Petitioner asserts that the supplemental report of proceedings did not specify what, if any, *Miranda* warnings the Palm Springs police gave to Mr. Brown in May 1991, including whether he was advised that he had the right to consult with counsel before making any statements, and whether he waived those rights. Respondent argues that given the existing transcripts, the supplemental report of proceedings, and the remaining documents in the record relating to the issue of the *Miranda* warnings, the Washington Supreme Court reasonably determined that there was a sufficient record for appellate review, and the state court reasonably rejected Petitioner's claim. Respondent also argues that Brown's claim fails because he fails to present any proof of prejudice.

In responding to the Petitioner's argument that a record of sufficient completeness was not provided for appellate review, the Washington Supreme Court held:

> The trial court's Supplementation of Report of proceedings, based upon contemporaneous notes taken by the court on July 10, 1992, constitutes a narrative report of proceedings for that portion of the hearing sufficient to make the record complete. Appellant's assertion that the trial court's narrative report is "conclusory at best" on this issue of *Miranda* warnings is rebutted by the fact that, along with the trial court's narrative report, the record on review also contains the tape

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[6] The report simply stated that "[t]he Defendant was advised of his *Miranda* rights on tape and the tape was allowed to run for the length of the interview." (SR 5578, 5583.)

> recordings of Appellant's statements to the Palm Springs Police which included *Miranda* warnings, [footnote omitted] as well as the trial court's oral ruling on the issue of *Miranda* warnings and [Wash. Rev. Code § 9.73]. [footnote omitted]. Additionally, there are verbatim repots of all other proceedings, including the testimony of Ms. Schnell, Ms. West and Ms. Gray. We reject Appellant's claim that the record is not sufficiently complete for review of the issues in this case.

State v. Brown, 940 P.2d at 579-80. For the following reasons, this Court agrees with Respondent that the Washington Supreme Court reasonably rejected Petitioner's claim.

The procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the U.S. Constitution. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). An appellate process that provides a criminal defendants appellant the minimum safeguards necessary to make the appeal "adequate and effective" satisfies both due process and equal protection concerns. *Smith v. Robbins*, 528 U.S. 259, 276-77 (2000). The Supreme Court has held that "[i]n terms of a trial record, this means that the State must afford the indigent a 'record of sufficient completeness' to permit proper consideration of his claims." *Mayer v. Chicago*, 404 U.S. 189, 194 (1971) (quoting *Draper v. Washington*, 372 U.S. 487, 499 (1963) (internal citations omitted)). This does not mean that a state must provide a verbatim transcript of the entire proceedings. *Id.*

Rather, what is constitutionally impermissible

is the total denial of a transcript based on indigency. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion) (holding a court cannot make available a trial transcript to those who can afford it, but deny the transcripts to those who are indigent). In *Norvell v. Illinois*, 373 U.S. 420 (1963) the Supreme Court declined to extent Griffin to cases where the transcript was unavailable due to the death of the court reporter. Instead the Court held that "some practical accommodation must be made." *Id.* at 424. This means that "[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *Mayer*, 404 U.S. at 194; *See also Draper v. Washington*, 372 U.S. 487 (1963) (speculating that narrative statement based on the trial judge's minutes taken during trial, a court reporter's untranscribed notes, or a bystander's bill of exceptions may all be equally as good as a transcript.

Several courts have also added to this a required showing of prejudice. *Bransford v. Brown*, 806 F.2d 83 (6th Cir. 1986) (holding the unavailability of transcripts of jury instructions is not a *per se* violation of a criminal defendant's due process rights, and requiring the petitioner to also show prejudice resulting from the missing transcript); *White v. State of Fla. Dept. of Corrections*, 939 F.2d 912, 914 (11th Cir. 1991) (finding the absence of a perfect trial transcript does not violate due process absent a showing of specific prejudice). *See also Scott v. Elo*, __ F.3d __, 2002 WL 2030715 (6th Cir. August 8, 2002) (stating that speculation that a transcript might aid the petitioner's claim is not sufficient to show a violation

of due process).

In the case at bar, Petition was only lacking the transcript for a single pre-trial hearing. Although the Supplementation of Report Proceedings did not specify what, if any, *Miranda* warnings the Palm Springs police gave to Mr. Brown in May 1991, any uncertainty could have been dispelled by the admission of the taped confession into evidence. In light of the Supreme Court concession that, absent verbatim transcripts of proceedings, "alternative methods of report trial proceedings are permissible" this Court must find that the Washington Supreme Court's finding that the narrative report, the tape recordings, and the trial court's oral ruling on the issue of *Miranda* warnings, in addition to the verbatim reports of all other proceedings, provided a sufficient record for appellate review was neither contrary to, nor an unreasonable application of clearly established federal law. Petitioner's fourth ground for relief is hereby denied.

Petitioner's Fifth Ground for Relief: Alleged Violation of Petitioner's Miranda Rights

Petitioner claims that his confession was obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner argues that the warnings given to him by the Palm Springs police were deficient under the Constitution and under *Miranda v. Arizona*, 384 U.S. 436 (1966), because the warnings failed to specifically advise him that he had a right to counsel before being questioned. The Washington Supreme Court held that, although the warnings did not apprise Brown that he had a right to counsel before questioning, other verbiage in the

warnings made that concept clear. *State v. Brown*, 940 P.2d at 575 ("[a]lthough the actual words 'before questioning' were not included in the first part of the statement, the second part which read 'and to have him present when you're being questioned' made that point sufficiently clear."). Petitioner asserts that the decision of the Washington Supreme Court was contrary to, or an unreasonable application of, clearly established federal law as stated by the Supreme Court and was based upon an unreasonable determination of the facts as presented in the state court proceedings.

Respondent argues that the *Miranda* warnings, when read as a whole, adequately advised Brown that he had the right to consult with counsel before questioning. Respondent further argues that Brown had extensive previous experience with police and prosecutors. He had a lengthy criminal history, including 1979 convictions for assault, NSF checks, possessing a syringe needle, a 1981 grand theft conviction, and 1984 assault convictions. (SR 6959.) Respondent suggests that the Washington Supreme Court reasonably determined that Brown was adequately advised of his *Miranda* rights, and that decision is not contrary to or an unreasonably application of clearly established federal law, therefore Brown is not entitled to relief.

The *Miranda* rule is a "prophylactic" measure that is meant to protect against violations of the Self-Incrimination Clause of the Fifth Amendment, which prohibits compelling a criminal defendant to testify against himself at trial. *See e.g., Chavez v. Martinez*, 538 U.S. 760, 764-68 (1994). The rule presumes that interrogation settings are coercive when a defendant is held in custody and pressured to confess without

specific warnings of his right to remain silent. *Miranda* warnings are, therefore, required before defendant's statement may be admitted as evidence. Although the Supreme Court has debated some aspects of *Miranda* warnings, one basic rule still applies. A person arrested or held in custody must be clearly informed of four things before any of his testimony may be admitted into evidence: 91) the defendant has the right to remain silent; (2) anything he says may be used against him in court; (3) he has the right to consult with an attorney and to have an attorney present during interrogation; and (4) if he is indigent, a lawyer will be appointed to represent him. *United States v. Patane*, 124 S. Ct. 2620 (2004); *Dickerson v. United States*, 530 U.S. 428, 435 (2000); *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966). Although the right to the presence of an attorney includes the right to consultation with counsel both before and during questioning, *see Ducksworth v. Eagan*, 492 U.S. 195, 203 (1989) citations omitted), the warnings need not be given in the exact language provided in *Miranda*. *See Id.* at 202-04. The question is whether the warnings reasonably and effectively conveyed to a suspect his rights as required by *Miranda*. *Id.*

A suspect, however, may waive his right to remain silent. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). A waiver is voluntary if it is "the product of free and deliberate choice rather than intimidation, coercion or deception." *Id.* A waiver is knowing and intelligent if it is "made with a full awareness of both the nature and the right being abandoned and the consequences of the decision to abandon it." *Id.* When considering whether the right to an attorney has been waived, a court must consider the facts and

circumstances of the case, and "the background, experience and conduct of the accused." *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979). Although, the voluntariness of a defendant's confession, plea, or waiver is a legal question, the Ninth Circuit has held that a state court's determination of whether a waiver was knowing and intelligent is a factual question entitled to a presumption of correctness. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (en banc).

The conversations with Palm Springs police being challenged by Petitioner are the following. The Palm Springs police interviewed Brown on May 27, 1991. At the beginning of the interview, Detective Harvey informed Brown of his *Miranda* rights:

> **Harvey:** . . . basically, what I'll do is I'll tell you what your rights are and uh . . . I'd like to hear your side of this thing too. Basically you have the right to remain silent. Anything you say can and may be used against you in court. You have the right to an attorney and have him present while you're being questioned, and if you can't afford one, one will be appointed for you by the curt.
>
> **Brown:** All right.
>
> **Harvey:** Okay. Having those rights, all of those rights.
>
> **Brown:** Okay.
>
> **Harvey:** Are you will to talk?
>
> **Brown:** I'm willing to talk.
>
> **Harvey:** Are you willing to talk with us, Cal?
>
> **Brown:** Okay.

(SR 8609-8610)

The detectives conducted a second interview on May 27, 1991, and advised Brown of his *Miranda* rights again at the beginning of the interview:

> **Harvey:** I want to make sure you understand that I've advised you of your rights on their case too. You have the right to remain silent. Anything you cay can and may be used against you in court.
>
> **Brown:** Uhm hmmmm.
>
> **Harvey:** You have the right to an attorney and to have him present when you're being questioned. If you cannot afford one, one will be appointed for you.
>
> **Brown:** Uhm hmmm.
>
> **Harvey:** Do you understand those rights?
>
> **Brown:** I understand the rights.
>
> **Harvey:** Having those rights in mind, you're willing to talk to us.
>
> **Brown:** Yeah, at this time.

(SR 8661.)

A third interview was conducted the following day, May 28, 1991, and the police again advised Brown of his *Miranda* rights:

> **Harvey:** Okay. Cai we're here because you asked us to come in and before we talk to you, I go over your rights every time.
>
> **Brown:** Okay.
>
> **Harvey:** Okay. I know you know them and I know that I've told them to you before but I

just like – I like to do that.

Brown: Play it safe.

Harvey: Yeah, play it safe, so that everybody know what – you know, the court knows what's happening and no one says that we were in here trying to trick you or anything like that. Okay? Uhm . . . the jailer, Mr. Smith, the young guy came to use and said that you wanted to talk to us.

Brown: Right.

Harvey: Okay. Let me tell you what your rights are one more time then.

Brown: Go ahead.

Harvey: You have the right to remain silent. Anything you say can and may be used against you in court. You have the right to an attorney and to have him present when you're being questioned. If you cannot afford an attorney, one will be appointed for you if you desire.

Brown: Yeah.

Harvey: Do you understand your rights?

Brown: Right.

Harvey: Do you care to speak with us?

Brown: Right.

(SR 8690-8691)

Clearly Brown had a right to an attorney before questioning. In apprising Brown of his *Miranda* rights Detective Harvey did not *explicitly* inform him of this right. However, there is no

Supreme Court precedent requiring that police use the words "before being questioned" in advising a suspect of his right to an attorney. In fact the Supreme Court has stated that such an exact incantation is unnecessary, and indeed would be unworkable. *See Duckworth*, 492 U.S. at 202-04; *California v. Prysock*, 453 U.S. 355, 355-56 (1981). The Washington Supreme Court's determination that, based upon the totality of the warning, the warning was sufficient under *Miranda*, was not an unreasonable application of clearly established federal law, nor was it based upon an unreasonable determination of the facts as presented in the state court proceedings. Petitioner's fifth claim for relief must be denied.

Petitioner's Sixth Ground for Relief: Jury Selection

Petitioner argues in his sixth claim for relief that the jury was selected in violation of the Due Process Clause of the Fourteenth Amendment. Petitioner argued on appeal that the trial court's rulings permitted the exclusion of prospective jurors on a broader basis than that allowed under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its progeny. The Washington Supreme Court found that the trial judge "did not abuse his discretion" in excluding jurors Denis, Henderson and Deal. *State v. Brown*, 940 P.2d at 601-04. Petitioner argues that this decision was contrary to, and an unreasonable application of, clearly established Federal law as established by the Supreme Court and was based on an unreasonable determination of the facts as presented in the state court proceedings.

Upon habeas review, determination as to

individual juror bias in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness. *Wainwright v. Witt*, 469 U.S. 412 (1985). *See also Darden v. Wainwright*, 477 U.S. 168, 175 (1986); *Patton v. Yount*, 467 U.S. 1025 (1984) (finding that impartiality of individual jurors is a question of fact). A petitioner must rebut such a finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The Sixth Amendment to the Constitution guarantees criminal defendants a trial by impartial, indifferent jurors. U.S. Const. amend. VI. A trial judge must exclude potential jurors who are unable to set aside their preconceptions and decide the case on the evidence presented in court. *Irwin v. Dawd*, 366 U.S. 717, 722-23 (1961). The standard for determining when the court may exclude a prospective juror because of his or her views on capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). A juror's bias need not be proved with "unmistakable clarity." *Id.* This standard is in contract to the one set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The *Witherspoon* Court ruled that a judge could not exclude every potential juror with reservations about the death penalty. *Id.* at 521-23. Instead, the Court stated that a court may exclude only those extreme opponents who would vote against the capital punishment in all cases regardless of the evidence presented. *Id.* In *Adams v. Texas*, the Court provided a new formulation of the rule and stated

that a capital punishment opponent may not be challenged for cause unless his views would "prevent or substantially impair" his ability to carry out his duties as a juror. 448 U.S. 38, 45 (1980). In *Wainwright*, the Supreme Court confirmed the *Adams* formulation as the proper rule and clarified that the stricter standard set forth in *Witherspoon* is not the proper basis for excluding death-scrupled jurors. 469 U.S. at 424.

The facts related to Petitioner's sixth claim for relief are as follows. Jury selection began on October 27, 1993. (SR 2013.) At the beginning of the jury selection, each potential juror was asked to complete a written questionnaire. Jurors were questioned individually regarding their ability to follow the law in a possible second phase of the trial (death-qualification). (SR 2018.) The State challenged jurors Denis, Henderson, and Deal for cause based upon answers made to questions concerning their ability to impose a sentence of death. Brown objected to the Court excusing jurors Denis and Henderson. He did not object to the exclusion of Deal.

Juror Lisa Denis

Juror Denis completed a questionnaire privately and prior to any examination by the court or parties. Questions 60-63 made inquiry in general terms on the subject of the death penalty. She indicated that she had been raised as a Catholic and had been taught the death penalty was wrong. She admitted that while she had been influenced by the Church, she had not been swayed to the belief and remained "indecicive" [sic]. She further stated that she would require the "evidence" to be

"overpowering" (presumably on the question of guilt.

Upon individual questioning, Ms. Denis expressed "moral" reservation about the penalty of death. (SR 2315.) She "felt the taking of [human life] was wrong. It's just not right." (SR 2312-2313.) When asked if she could follow the court's instructions, Ms. Denis said, "Oh yea, I could follow the instructions. I think that – actually making that decision, no." (SR 2314.) Although Ms. Denis stated she thought she could put her emotions aside and follow the judge's instructions (*see* SR 2315), she also stated that it "definitely would be a sense of relief not to have to go to the death penalty." (SR 2320.) She said she could impose the death penalty only if the proof was "crystal clear." (SR 2320.) When asked specifically by the court, Ms. Denis indicated that she did not think she could vote to impose the death penalty. (SR 2323.) The State then challenged Ms. Denis for cause. The superior court found Ms. Denis "substantially impaired" in her ability to follow the court's instruction and granted the state's motion. (SR 2327-28.)

Juror Kristin Henderson

Juror Henderson, an attorney, was also excluded from the panel on the state's motion. In her initial questionnaire, she stated an opposition to the death penalty. In answer to questions during *voir dire* Ms. Henderson expressed a resentment about having to make a decision about the matter by virtue of having been called to jury service. (SR 2101.) She stated she had "some awfully strong feelings" on the death penalty. (SR 2104.) Ms. Henderson found the death penalty "barbaric." (SR 2104.) She was clear, however, that she would be able to "set aside [her]

resentment and [her] feelings about the death penalty," . . . "accept the law from the Court, consider the evidence that is presented in court, and make a decision, a reasoned decision under the law of the State of Washington." (SR 2103-04.) The State challenged Ms. Henderson for cause, and the superior court found that she was substantially impaired and excused her for cause. (SR 2112-2113.) Brown objected to the exclusion of Juror Henderson. (SR 2112.)

The court's ruling excluding Juror Henderson was the basis of a motion to recall her or strike the panel and being anew. (SR 6521.) The court denied the motion indicating that the decision to excuse Ms. Henderson as substantially impaired was based upon most convincingly "her body posture" . . . "the way she crossed her arms, and what she was telling us at that point in time." On November 29, 1993, the selected jurors were sworn to try the cause.

Juror Richard Deal

Juror Deal, in his questionnaire, state a "belief" in the death penalty. In answer to questions regarding his views, he indicated that the death penalty was appropriate in "severe" situations (SR 2199), such as when "a person is, would be incorrigible and would reviolate if released." (SR 2203-04.) He indicated that he could consider the options of life without parole and death, and could vote for a death sentence if he was "convinced that was the appropriate measure." (SR 2216.) Mr. Deal also indicated some confusion about the impact of a life sentence without parole and the standard of proof. Mr. Deal stated that he would only impose the death penalty if someone could kill again on parole,

and that the standard of proof was "beyond a shadow of a doubt" rather than "beyond a reasonable doubt." (SR 2211-18.) The State challenged Mr. Deal for cause and Brown did not object. (SR 2218-2219.)

The Washing Supreme Court found that the trial judge did not abuse his discretion in excluding jurors Denis, Henderson, and Deal. *State of Brown*, at 601-04. Applying the standard set forth in *Wainwright*, the Washington Supreme Court found that the trial court did not abuse its discretion in excusing Juror Denis for cause: "The record supports the court's finding that her views about the death penalty would have substantially impaired her ability to follow the court's instructions." *State v. Brown*, 940 P.2d at 585. The court made the same finding as to Juror Henderson "because her oral responses and body language showed she would be substantially impaired in performing her duties as a juror." *Id.* Finally, regarding Juror Deal, the court observed,

> Appellant did not object at trial to the State's challenge of Richard Deal for cause. At any rate, Mr. Deal was properly excused. On *voir dire* he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing Mr. Deal for cause.

Id. These decisions were not contrary to, or an unreasonable application of, clearly established federal law as established by the Supreme Court. Both the trial court in excusing the jurors, and the

Washington Supreme Court is addressing Petitioner's claim of improper dismissal, applied *Wainwright*'s standard. There is sufficient evidence to establish that each juror's views would "prevent or substantially impair" his or her ability to carry out the duties imposed on jurors. Even if this Court would not have dismissed the jurors for cause, it cannot substitute its judgment for that of the state courts. The Washington Supreme Court's decision was not an unreasonable determination of the facts as presented in the state court proceeding. Petitioner's sixth ground for habeas relief must be denied.

Petitioner's Eighth Ground for Relief: Ineffective Assistance of Counsel

Petitioner argues that he was deprived of his Sixth Amendment right to the effective assistance of counsel at the sentencing phase of his trial. Since this claim was the subject of the November 4, 2003 Evidentiary Hearing, some discussion of what occurred at the sentencing phase is helpful.

The trial court appointed Lin-Marie Hupp, Terry L. Mulligan, and Kern W. Cleven as counsel to represent Brown in both the guilt and sentencing phases of his criminal trial. At sentencing, Petitioner sought to raise his alleged bipolar disorder as a mitigating factor under Wash. Rev. Code § 10.95.070. To avoid the death penalty, Petitioner needed to convince only one juror that the mitigating circumstances did not warrant a death sentence. Brown's primary mitigation argument was that he suffered from a form of mental illness for which he did not receive adequate treatment or supervision upon his release from Oregon State Prison, where he

was incarcerated prior to Ms. Washa's murder. Brown presented the testimony of Dr. Roland Maiuro, a clinical psychologist and associate professor at the University of Washington School of Medicine, to support his argument. Dr. Maiuro testified at the sentencing phase that Brown suffered from, among other things, manic syndrome, a disorder for which lithium is often prescribed. Dr. Maiuro added that when Brown was released from the Oregon State Prison, ingestion of lithium should have been a condition of his parole. Dr. Maiuro also testified that although lithium treatment was warranted, he could not prescribe it for the petitioner because he is not a medical doctor.

In preparation for the sentencing phase of the trial, Dr. Maiuro notified defense counsel that he was not a medical doctor and recommended that counsel contact Dr. John Brinkley, who was qualified in the area of lithium management and in prescribing medication. Defense counsel contacted Dr. Brinkley, but he ultimately decided to serve as the prosecution's witness in the sentencing phase. Defense counsel did not contact a similarly qualified expert.

At the sentencing phase of the trial, Dr. Brinkley testified that he saw no indication from the Oregon State Prison records that Brown suffered from a disorder for which lithium treatment was appropriate. Defense counsel made a tactical decision, after some internal disagreement, not to cross examine Dr. Brinkley. Instead of conducting a cross examination, defense counsel opted to counter Dr. Brinkley's testimony during the closing statement, which Brown alleges his counsel ultimately failed to do. In contrast, the prosecution

during its closing statement attacked Dr. Maiuro's conclusions, emphasizing that he was not licensed to prescribe lithium treatment. They honed in on his qualifications as a clinical psychologist to testify authoritatively about the effects of properly managed lithium treatment for someone suffering from bipolar disorder. The prosecution additionally attempted to discredit Dr. Maiuro by contrasting his testimony with Dr. Brinkley's testimony. Petitioner maintains that he was deprived of effective assistance of counsel at sentencing due to his trial counsel's failure to (1) cross examine Dr. Brinkley, (2) consult with and call a psychiatrist who was qualified to discuss lithium treatment, and (3) call as a witness Sally Schick, whose observations of Brown while he was incarcerated at the Oregon State Prison allegedly were critical to his claim that he suffered from a mood disorder at the time of his offense.

The Washington Supreme Court, in reviewing Petitioner's PRP, held:

> Petitioner cannot under this claim establish either deficient performance by his counsel or resulting prejudice. In the presentation of manic mood disorder as mitigating evidence, the focus is on the disorder and not on its treatment with lithium. Petitioner apparently claims that because his own witness, Dr. Maiuro, could not legally prescribe medication, his credibility as an expert was somehow impaired. Dr. Maiuro was eminently qualified to render an opinion whether Petitioner suffered from a mental illness which would have excused his violent behavior, he being the director of the Anger Management and Domestic Violence Program at Harborview

> Medical Center/Mental Health Center and Associate Professor in the Department of Psychiatry and Behavioral Sciences at the University of Washington School of Medicine. Petitioner cannot establish how additional corroborating testimony would have changed the result of the penalty phase of his trial.

In re PRP of Brown, 21 P.3d at 697-98. Again, upon federal habeas review this Court may only consider whether the state court decision was an unreasonable application of clearly established federal law as determined by the Supreme Court.

The Supreme Court specifically addressed the question of what standard to apply in judging whether a death sentence should be set aside due to ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). In holding that judicial scrutiny of counsel's performance must be highly deferential, the Court stated "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluation the conduct from counsel's perspective at the time." *Id.* at 689. The Court concluded that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular, *viewed as of the time of counsel's conduct*." *Id.* at 69 (emphasis added). The Court explicitly reiterated these guidelines in both *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). Additionally the Ninth Circuit has stated that an attorney's latter-day belief in his or her "own incompetence runs afoul of the rule of contemporary assessment." *Hendricks*

v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995). The Court will address the two prongs under *Strickland* in turn.

Reasonableness

Clearly, counsel has a duty to investigation and present mitigating evidence. *See e.g.*, *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004). Trial counsel also has an obligation to conduct a thorough investigation of the defendant's background. *Williams*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). However, the duty to investigate is not limitless and "does not necessarily require that every conceivable witness be interviewed. " *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 195). "[A] penalty phase ineffective assistance claim depends on the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." *Stankewitz*, 365 F.3d at 716. Moreover, "counsel's tactical decision at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must similarly meet only objectively reasonable standards." *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir.), *cert. denied*, 531 U.S. 908 (2000). The burden is on Petitioner to overcome the presumption that counsel's action or omission was "sound trial strategy." *Strickland*, 466 U.S. at 689.

Two cases cited frequently by Petitioner can be distinguished at the outset. In *Williams v. Taylor*, the Supreme Court found counsel's representation during the sentencing phase fell below professional standards when counsel "did not begin to prepare for

that phase of the proceedings until a week before trial," and "failed to conduct an investigation that would have uncovered extensive records graphically describing petitioner's nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395. The court goes on to recount the childhood neglect and abuse suffered by Petitioner but never revealed to the jury, and to list all the available evidence that would have assisted counsel in his mitigation defense. *Id.* at 396. Similarly, in *Stankewitz v. Woodford*, the Ninth Circuit found that the evidence presented in mitigation mostly dealt with generic testimony about the "Power of God" to help persons change their lives. *Stankewitz*, 365 F.3d at 716. In a declaration, Stankewitz's defense counsel admitted that he conduct very little investigation into mitigating evidence and explained it was due in part to his client's purported opposition to a penalty phase defense, an explanation that was belied by the record. *Id.* at 721. These two cases involved a total absence of mitigating factors. Petitioner, on the other hand, argues about "net effect" and what defense counsel "could have done." In hindsight, it is always possible to say a defense that resulted in imposition of the death penalty could have been stronger, but that is very different from an argument that a criminal defendant lacked altogether a defense of mitigating factors. Therefore, the Court turns to weighing the magnitude of the discrepancy.

Defense counsel presented a substantial amount of mitigation evidence during the penalty phase of trial. Dr. Maiuro testified to the symptoms of manic syndrome. He testified that Brown was

severely impaired in his ability to regulate his behavior, and could not relate to people in any way except in unhealthy and violent fashion. He also opined that the Oregon prison system did not adequately monitor Brown's lithium usage. In addition to the testimony of Dr. Maiuro, the defense team called as a witness Dr. Cedoline, a school psychologist who counseled Brown. Dr. Cedoline testified that Brown displayed explosive temper outbursts, was socially isolated from other children and had poor self-esteem, that he suffered from Attention Deficit Hyperactivity Disorder as a child, and had made some process while in counseling before moving to another school in the eighth grade. Finally, the defense presented testimony from Brown's stepmother and two of Brown's aunts.

Turning to defense counsel's investigation, the Court notes that a tremendous amount of energy went into developing mitigation evidence. Defense counsel collected and presented at trial volumes of records related to Brown's social history and mental health history. They contacted members of Brown's family and interviewed or attempted to interview numerous potential fact and expert witnesses, including mental health professionals who had treated Brown. They created a several hundred page "life chronology" that detailed Brown's social and mental health history. Most of the information developed in the life chronology was presented at trial.

Defense counsel also attempted to find experts who would assist in Brown's defense, but their efforts were hampered by difficulty in obtaining adequate funding, and the limited pool of available experts willing to work on the case. They retained

Dr. Cripe, a neuropsychologist, who examined Brown for evidence of organic brain damage. Although he did not find any such damage, he recommended that a specialist in clinical psychology examine Brown. The team debated the benefits of a psychological evaluation as opposed to a psychiatric evaluation, and determined that a psychological evaluation would ultimately provide more evidence.

Defense counsel then retained the services of Dr. Maiuro, who reviewed Brown's social and mental health records, reviewed Dr. Cripe's test results, interviewed Dr. Cedoline, interviewed some of Brown's family members, interviewed Brown and gave Brown psychological tests. Dr. Maiuro diagnosed Brown as having an antisocial personality disorder, sexual sadism and manic syndrome. A short time prior to the start of trial Dr. Maiuro recommended the defense team contact Dr. Brinkley, which they did, only to learn that he had already been retained by the prosecution. The record shows that Mr. Cleven and Ms. Hupp had interviewed Dr. Brinkley prior to his testimony. Mr. Cleven had prepared a cross-examination of Dr. Brinkley. Although the defense team ultimately decided not to cross-examine Dr. Brinkley, there is no sign that defense counsel were deficient in their preparations.

In contrast, Petitioner argues that the following types of evidence should have been presented. First, the testimony of Sally Schick would have corroborated the testimony of Dr. Maiuro that Petitioner benefitted from lithium treatment while in prison. Second, cross-examination of Dr. Brinkley would have revealed that he failed to conduct a personal interview of the Petitioner and that he failed to review Petitioner's social history. Finally,

since defense counsel sought to present a defense that necessarily required the testimony of a psychiatrist, i.e. Petitioner suffered from a mood disorder that required treatment with a specific medication, defense counsels' representation fell below professional standards when they failed to retain such a witness. Dr. Scher, who testified so elegantly at the Evidentiary Hearing, would have been available to assist with this defense.

The Court finds that Petitioner has failed to bear the burden of rebutting the presumption that defense counsel's decisions about how to proceed during the sentencing phase conformed with professional standards. This finding is in keeping with Supreme Court precedent. *See e.g., Bell v. Cone*, 535 U.S. 685 (2002) (finding that it was not objectively unreasonable for state court to deem counsel's performance as involving tactical decisions about which competent lawyers might disagree where counsel had tactical reasons for not calling witnesses during sentencing phase); *Burger v. Kemp*, 483 U.S. 776 (1987) (holding counsel's strategic choice not to introduce any mitigating evidence even after a less than complete investigation was supported by reasonable professional judgment when the evidence that could have been presented would not have been helpful in establishing mitigation). The state court application of the reasonableness prong of the *Strickland* test was not contrary to established federal law, nor was it an unreasonable application of that law.

Prejudice

Petitioner argues that he suffered prejudice because case law shows that (1)mental illness can

affect a sentencing determination; and (2) the gruesome nature of the crime does not make it impossible to conclude any jury would impose death.

This Court is limited to reviewing the state court decision for the errors already described in the section discussing the standard of review for federal habeas petitions. The Washington State Supreme Court did not address the issue of prejudice because it found that trial counsel's performance was not deficient. *In re PRP of Brown*, 21 P.3d 687 (2001). However, even had the Washington Supreme Court discussed the issue, it is doubtful that it would have found prejudice. Habeas relief is appropriate where "[a]bsent the errors the sentencer independently weighing the evidence would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Stankewitz*, 365 F.3d at 723. In assessing prejudice, a court should reweigh the evidence in aggravation against the totality of available mitigating evidence. *Id.*

Any mitigating evidence would be presented against the overwhelming backdrop of the events leading up to Ms. Washa's murder, recounted in detail at the outset of this opinion. Add to that Petitioner's extensive criminal history, including prior convictions for (1) assault with a deadly weapon, (2) grand theft, (3) attempted assault in the first degree, (4) assault in the second degree, (5) attempted murder in the first degree, (6) aggravated mayhem, (7) torture, (8) false imprisonment, and (9) robbery in the first degree. The jury also heard evidence of the attempted murder of Ms. Schnell in California immediately following the murder of Ms. Washa in Washington. Petitioner's argument that mental illness can affect a sentencing decision turns

a blind eye to the fact that Dr. Brinkley had also determined that Brown was a sociopath. Although he disagreed that Brown suffered from a mood disorder, and therefore disagreed that a lithium treatment would have been appropriate, this did not discount the fact that the jury heard evidence of Petitioner's mental illness. In sum, the Court finds that the totality of the circumstances in this case do not raise a reasonable probability that the result of the sentencing proceeding would have been different if the three types of evidence propounded by Petitioner would have been presented. Petitioner's eighth ground for relief is denied.

Petitioner's Tenth Ground for Relief: Post-Conviction Relief

Petitioner asserts that the Washington procedures for seeking post-conviction relief, as administered by the Washington Supreme Court in this case, failed to comport with the minimum requirements of due process of law. Petitioner's PRP contained a claim that he was deprived of his Sixth Amendment right to effective assistance of counsel because trial counsel failed to obtain the opinion of a psychiatrist who could have confirmed the diagnosis of bipolar disorder and who could have confirmed Brown's need for monitored lithium. *In re PRP of Brown*, 21 P.3d at 700-1. During post-conviction proceedings, Brown filed a motion in the Washington Supreme Court for the appointment of a psychiatrist. The motion was denied. (SR 8341.) Petitioner also filed several other motions, including a motion for permission to take the deposition of Dr. Brinkley, one to take a documents deposition of the King County Superior Court Audit Committee records custodian, and a request for funds for the

appointment of a mitigation specialist. These motions were also denied. (SR 8205-8253, 8314, 8323-8337.) Respondent argues that this type of relief is not available on federal habeas review.

The Due Process Clause of the Fifth Amendment does not establish any right to collaterally attack a final judgment of conviction. *United States v. Maccollom*, 426 U.S. 317, 323 (1976); *See also Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244, 1250 (1998) (plurality opinion); *Murrary v. Giarratano*, 492 U.S. 1 (1989). Although there is arguably no explicit statement from the United States Supreme Court on whether federal habeas relief is available to redress alleged procedural errors in state post-conviction proceedings, there is ample valid caselaw supporting this approach to suggest the Supreme Court approves of the practice. *See Ortiz v. Stewart*, 149 F.3d 923, 923 (9th Cir. 1998); *cert. denied*, 526 U.S. 1123 (1999) ("Moreover, this court has specifically stated that federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings."); *Millard v. Lynaugh*, 810 F.2d 1403, 1410 (5th Cir. 1987); *cert. denied*, 484 U.S. 838 (1987) (stating "[e]ven if there was some error in the state denial of a hearing before adjudicating petitioner guilty of abuse of the writ process, this would not entitle Petitioner to federal habeas corpus relief because the complaint is an attack on a proceeding collateral to the detention and not to the detention itself."). *See also Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989); *cert. denied*, 493 U.S. 1012 (1989); *Mitchell v. Wyrick*, 727 F.2d 773, 774 (8th Cir. 1984) (per curiam); *cert. denied*, 469 U.S. 823 (1984); *Kirby b. Dutton*, 794 F.2d 245,

247-48 (6th Cir. 1986). Accordingly, this Court concludes that Petitioner's tenth ground for relief cannot be addressed in federal habeas proceedings and must be denied.

CONCLUSION

For the aforementioned reasons, Petitioner's petitioner for writ of habeas corpus is hereby DENIED.

SO ORDERED this 15th day of September, 2004.

/s/John C. Coughenour

UNITED STATES DISTRICT JUDGE

FILED

July 24, 1997

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent	)	Number 61320-6
v.	)	En Banc
CAL COBURN BROWN,	)	Filed Jul 24 1997
Appellant	)	

SMITH, J. – Appellant Cal Coburn Brown upon direct review appeals his conviction and sentence for aggravated first degree murder. A jury in the King County Superior Court, after a finding of "guilty," determined he did not merit leniency. The trial court then on January 18, 1994 sentenced Appellant to death as required by statute. We affirm the conviction and sentence.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Whether, under RCW 10.95, the capital punishment statue, (a) there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency; (b) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; (c) the sentence of death was brought about by passion or prejudice; or (d) the defendant was mentally retarded;

(2) Whether the proportionality review mandated by RCW 10.95.130 is void for vagueness under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 14 of the Washington Constitution;

(3) Whether statements made by prosecuting attorneys during the guilt and penalty phases of the trial constituted prosecutorial misconduct which denied Appellant a fair trial;

(4) Whether the trial court erred in admitting the testimony of Ms. Susan J. Schnell, surviving victim in a criminal encounter with Appellant in California;

(5) Whether the trial court erred in admitting the testimony of Ms. Jan M. Gray and Ms. Brieanna C. West, who had noncriminal encounters with Appellant in California and Washington;

(6) Whether Appellant was adequately advised of his *Miranda* rights before making statements to Palm Springs, California police detectives;

(7) Whether Appellant's statements to Palm Springs, California police, where were recorded without his knowledge as permitted by California law, violated Washington's Privacy Act, RCW 9.73, and thus were inadmissible in Washington courts;

(8) Whether there is before this court a record of "sufficient completeness" for adequate appellate review of the issues presented in Appellant's appeal:

(9) Whether the trial court erred in allowing prospective jurors to be "death qualified" during voir dire examination;

(10) Whether certain prospective jurors were properly excused for cause;

(11) Whether the terms "premeditation" and "intent" were sufficiently explained in the trial court's instructions to the jury;

(12) Whether the trial court properly instructed the jury concerning the aggravating factors in the case;

(13) Whether the trial court erred in refusing to give the jury certain instructions proposed by the defense in the penalty phase;

(14) Whether Appellant was properly served with the Notice of Special Sentencing Proceeding required by RCW 10.95.040(2);

(15) Whether Criminal Rule 4.7 (CrR 4.7) mandates reciprocal pretrial discovery of evidence relevant to the penalty phase in a capital case; and

(16) Whether the trial court erred in refusing to admit victim impact evidence in the penalty phase of the trial.

STATEMENT OF FACTS

On May 27, 1991, Memorial Day, King County police, following a telephone call from police detectives in Palm Springs, California, discovered the body of a twenty-one-year-old woman, Ms. Holly C. Washa, in the trunk of her 1985 blue Oldsmobile automobile parked in space 266 of a Budget Park and Ride lot near the Seattle-Tacoma Airport. She was wearing a leather jacket covered with blood, and the strap of her purse was tied and knotted tightly around her neck. The strap was sunken into the cavity of a deep slash wound across her neck.

The events surrounding Ms. Washa's death began on May 18, 1991 when the appellant in this case, Cal Coburn Brown, was in La Jolla, California at the Hyatt Regency Hotel. While in the hotel lounge, Appellant met Ms. Jan M. Gray from the Seattle area, who was in La Jolla with her mother on vacation. While socializing with Ms. Gray and her mother, Appellant told them he was an architect who built houses. He also told them he had trouble meeting single women. Ms. Gray mentioned that she had a single friend named Brieanna West who also lived in the Seattle area and who had similar problems meeting single men. After some coaxing by Appellant, Ms. Gray telephoned Ms. West and arranged a blind date for them in Seattle.

On May 20, 1991, Appellant traveled by air to Seattle. En route, there was a scheduled stop in Ontario, California, where Ms. Susan J. Schnell boarded for a business trip to Lewiston, Idaho. Appellant and Ms. Schnell, who were sitting near each other, began talking during the flight. She found him friendly and interesting. He told her he was a "home designer" and spoke with an Australian accent. He also told her he wanted to see her again. She gave him her home and business telephone numbers and the name of the hotel where she would be staying in Lewiston. That same evening Appellant met with Ms. Brieanna C. West for drinks at the Seattle-Tacoma Red Lion Inn. She found him physically unattractive and did not want to see him again. Appellant stayed at the Red Lion Inn that night and Ms. West returned to her apartment.

Appellant telephoned Ms. Susan J. Schnell in Idaho at 9:00 p.m. the next evening and asked her if she could spend some time with him in Seattle. She

told him she planned to fly back to California the next day, May 22, 1991, and would be in Seattle on a brief layover. She and Appellant made plans to meet at the Seattle-Tacoma Airport during her layover. Appellant then telephoned the Shadow Motel in the airport area and made arrangements to leave his luggage there. He told an employee of the motel he had met a woman and was going to fly to Palm Springs to meet with her again.

On May 22, 1991, Appellant met with Ms. Schnell at the Seattle-Tacoma Airport for dinner. They discussed getting together in Palm Springs for the upcoming Memorial Day weekend. Without making definite plans, Ms. Schnell took her flight back to Ontario, California. Later that evening, Appellant telephoned Ms. Schnell in California and arranged to spend Memorial Day weekend with her in Palm Springs.

Appellant's Statement to Police

On May 27 and 28, 1991, Appellant made statements to police detectives in Palm Springs, California in three interviews which were recorded without his knowledge. In his statements he related in calm, deliberate, clear, graphic and specific detail a narrative of his activities, with few questions from the detectives, who courteously allowed him to relate his story.[1] His statements may fairly be characterized as admissions or confessions.[2]

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[1] A critical issue in this appeal is admissibility of the audio tapes admitted as State's Ex. 89.

[2] *See* BLACK'S LAW DICTIONARY (6th ed. 1990): *Confession* ("A voluntary statement made by a person charged with the commission of a crime . . ., communicated to another person . . . [acknowledging oneself] to be guilty of the offense

On the morning of May 23, 1991, Ms. Holly C. Washa was at the Wyndham Garden Hotel near the Seattle-Tacoma Airport where she had just quit her part-time job. As she was driving out of the parking lot in her 1985 Oldsmobile, Appellant pointed to one of the tires on her automobile suggesting something was wrong. She stopped. Appellant then forced his way into her automobile, stuck a knife[3] in her face, and grabbed her by the hair. He demanded that she "drive or die," and began rummaging through her purse for money. Finding only a small amount of change, he looked at her checkbook. He then forced her to write a check for $350.00, the entire balance in her checking account. They went through the drive-up window at a Seafirst Bank in Federal Way and cashed the check. Then they went to the Seattle waterfront area where Appellant tied Ms. Washa's hands behind her back with her purse strap and forced her into passenger seat of her automobile. He asked her several questions concerning her schedule on a typical day, who her roommates were and what they did.[4] He then purchased some handcuffs at a gun shop while leaving Ms. Washa tied up in the

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charged, and [disclosing] the circumstances of the act or the share and participation [the person charged] had in it." BLACK'S at 296). *Admission* ("[T]he avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt." BLACK'S at 48).

[3] The "knife" referred to throughout this narrative was actually an all purpose tool, with the brand name "Leatherman," which contained multiple folding implements, including a knife blade.

[4] Ex. 89, tape 1, side 2.

automobile.[5]

After purchasing the handcuffs, Appellant took Ms. Washa back to his room at the Shadow Motel where he paid for an extra night. He demanded that she remove all her clothing, after which he tied her to the bed with his neckties and her purse strap. He cut up her shirt and stuffed it into her mouth for a gag. He then ordered her to get dressed again and took her to get something to eat. While at a Burger King drive-through, he held the knife in a threatening position where she could see he might use it. Upon their return to the motel room, he ordered her to remove her clothing and lie face down on the bed. He also told her not to scream or do anything. Appellant said Ms. Washa began fellating him, which he took as her consent for sexual activity.[6]

Appellant then engaged in sexual intercourse with Ms. Washa for about two hours, during which time he noticed she was looking at the door and possibly thinking of escape. Appellant decided it was time "to have a little control . . make her a little more scared of me, basically." He then tied her in a face up, spread-eagle position, with her hands behind her back and her mouth gagged, and whipped her "maybe half a dozen times . . . ."[7]

Appellant allowed Ms. Washa to get dressed again, tied her hands behind her back, and drove her to Federal Way for pizza. When they returned to the motel, Appellant again forced her to undress and tied

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[5] Ex. 89, tape 2, side 1.

[6] Ex. 89, tape 1, side 2.

[7] Ex. 89, tape 2, side 1.

her to the bed in a face down, spread-eagle position with her hands tied behind her back. He then had sexual intercourse with her again. At about 11:00 p.m. that evening, he telephoned Ms. Susan J. Schnell in California to reconfirm their weekend plans in Palm Springs. After that, he crawled into bed with Ms. Washa, who was still bound and gagged and they "dozed."[8]

The next day, Friday, May 24, 1991, Appellant forced Ms. Washa to drive him to her apartment where he hoped to find checks belonging to her roommates that he could forge. He found some checks and attempted to cash them in $500.00 amounts, but was thwarted when the banks wanted to compare signatures with signature cards on file. Appellant became irritated with Ms. Washa when the check-cashing plan did not go as he had hoped. She began to drive somewhat erratically, making him even angrier.[9]

When they returned to the motel, Appellant again tied Ms. Washa to the bed face down in a spread-eagle position with her hands handcuffed behind her back and her mouth gagged with a washcloth. He penetrated her vaginally and anally with an aftershave lotion bottle.[10] He shaved her pubic hair and held a hot hair dryer close to her vagina, breasts and stomach. He also shocked her by using an electric extension cord with the end cut off. He described these acts as "torture" and acknowledged that the electric shock was

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[8] Ex. 89, tape 2, side 1.

[9] Ex. 89, tape 2, side 1.

[10] Ex. 89, tape 2, side 2.

particularly painful.[11]

At 8:45 on the evening of May 24, 1991, Appellant left for the Seattle-Tacoma Airport to embark on his trip to California. He forced Ms. Washa into the trunk of her blue 1985 Oldsmobile automobile with her hands hand-cuffed behind her back and drove to the Doug Fox Travel Agency parking lot where he momentarily parked the automobile. Because shuttle busses were driving around the lot, Appellant was concerned that someone might discover Ms. Washa since "she could just bang and clang and crunch and scream and be out very quickly."[12] He then went to the trunk and cut her throat with "three swipes" and stabbed her several times in the chest and abdominal areas.[13] Because Ms. Washa's blood began leaking from the trunk of the automobile, Appellant moved from the Doug Fox lot to the Budget Park and Ride lot near Shumsky's Restaurant in the airport area. He told detectives:

> I was going to do her at one place and leave here there and the blood started coming out from underneath the car . . . . So I panicked and left that place and drove around to a different place . . . with all the rain and stuff it would just wash away and it wouldn't show.[14]

Appellant told detectives he killed Ms. Washa because he did not want to leave any witnesses alive. He also told them he kidnapped her because he

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[11]Ex. 89, tape 1, side 2.

[12] Ex. 89, tape 2, side 1.

[13] Ex. 89, tape 3, side 1.

[14] Ex. 89, tape 1, side 2.

needed money to get to California and "didn't like the idea of waltzing into a bank with my face, you know, all over the place." He also stated he was "going to rob somebody and let 'em go but then I just realized . . . after I did it that it would just be the same as waltzing into a bank and have my picture taken."[15]

Appellant also told his Oregon parole officer, Larry Wibbenmeyer, in a telephone conversation on May 28, 1991 that he took Ms. Washa's life at the last minute. He described his actions as resulting from "panic."

Events in California

Appellant telephoned Ms. Susan J. Schnell from the airplane while en route to California to confirm the time he would meet her at a hotel near the Ontario Airport. Upon arrival there he had some drinks and later checked into a hotel. Appellant and Ms. Schnell met at about noon the next day, Saturday, May 25, 1991, and drove in her sports car to Palm Springs where they checked into a Ramada Inn. They had planned to stay in separate bedrooms, but because of a reservation mix-up, they had to stay in the same room with only one bed. They slept in the bed that night but did not have intercourse.

Appellant and Ms. Schnell spent Sunday, May 26, 1991, touring the Palm Springs area together. She was driving her burgundy red 1981 Corvette sports car. Upon returning from dinner around midnight, they began kissing and fondling. Appellant performed cunnilingus on Ms. Schnell and then offered to give her a back rub. Appellant straddled her while she lay face down on the bed.

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[15] Ex. 89, tape 1, side 2.

Suddenly he violently jerked her arms back and told her not to scream. When she did, he slit her throat. As she continued to scream, Appellant restrained her with handcuffs and brought the knife around to her chest and threatened her with it. She saw the knife. He told her he just wanted her money. Appellant repositioned Ms. Schnell on the bed and tied her to it, using her pantyhose. He shaved her pubic hair and raped her vaginally and orally. He then ordered her to write him a check for $4,000.00, which she had difficulty completing to his satisfaction until her third attempt.

Appellant became concerned about Ms. Schnell's bleeding and told her he was going out for medical supplies. He tried to gag her with a sock and restrain her arms above her head, but abandoned the effort when she began coughing up blood. Her feet, however, remained handcuffed to the bed. While he was gone, she was somehow able to reach the telephone and call the desk clerk. Palm Springs police arrived and took a description of Appellant from Ms. Schnell.[16]

When Palm Springs police officer Glen Haas saw a man who fit Appellant's description in the hotel parking lot, near a red Corvette sports car, he drew his firearm and told him to stop and put his hands up. Appellant identified himself as "Cal." Officer Haas asked him where the knife was, and Appellant responded "in my right front pocket." When asked his last name, Appellant replied "Brown." Officer Haas then arrested Appellant on

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[16] She was taken to the hospital for emergency surgery. She survived and testified as a witness in the King County trial.

suspicion of attempted murder.

After being processed by the Palm Springs police, Appellant was interviewed by Detective Mark Harvey and his partner, Detective Al Franz. Three interviews took place between May 27 and May 28, 1991, with the first two initiated by the detectives and the third initiated by Appellant. Before each interview, Appellant was read his *Miranda* rights, stated he understood them, and agreed to talk with the detectives. Each interview was tape-recorded without Appellant's knowledge or consent. During the first interview, Appellant in specific detail admitted his attack upon Ms. Schnell. Later in that interview, he admitted killing Ms. Washa before coming to Palm Springs. He told the detectives where the killing took place in Washington and where Ms. Washa's automobile could be found. The Palm Springs police immediately contacted King County police who dispatched local officers to the Budget parking lot near the Seattle-Tacoma Airport where they located the 1985 blue Oldsmobile in space 266 with Ms. Washa's body in the trunk. Appellant still had the keys to Ms. Washa's automobile in his possession.

Based upon his behavior with Ms. Schnell, Appellant pleaded "guilty" in California to attempted murder in the first degree, aggravated mayhem, torture, robbery in the first degree, and false imprisonment. On November 26, 1991 he was sentenced to life imprisonment in that state.

Corroborating Evidence

King County Medical Examiner Donald T. Reay, M.D., performed an autopsy on Ms. Holly C. Washa. He concluded her death was caused by an

extensive incised wound to her neck and strangulation by a ligature with a very rigid knot. He also noted that both stabbing and slicing occurred in the throat, requiring at least two motions to inflict the incised wound. It was his opinion that the hemorrhages in her eyes indicated the strangulation occurred first.

In addition to the lethal injuries, Dr. Reay described other trauma to Ms. Washa's body. Her pubic hair had been shaved. Her face was severely bruised. Both the inside and outside of her vaginal area was bruised. There was also bruising around her anus. The vaginal and anal injuries indicated forcible penetration with a hard object consistent with an aftershave bottle belonging to Appellant found in his Palm Springs hotel room. Her nipples showed abrasions and a linear pattern of bruising consistent with being whipped by a belt or cord. Similar bruising was found on her inner thigh, which also indicated whipping. Her feet and ankles were covered with bruises consistent with having been restrained. Her chest and abdomen had multiple stab and slicing wounds. An "irregular blemish-like area of red drying" on her inner thigh indicated burning. The stab wounds were consistent with the knife blade of the Leatherman tool Appellant had in his pocket when he was arrested.[17]

Appellant was charged by information on June 11, 1991 in the King County Superior Court with aggravated murder in the first degree. He was arraigned on February 26, 1992. A notice to determine whether the death penalty should be

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[17] The State also presented corroborating witness testimony and physical evidence. *See* Br. Of Resp't at 24-27.

imposed was filed on March 24, 1992. He was tried by jury before the Honorable Ricardo S. Martinez. The trial began with jury selection on October 25, 1993. Guilt phase testimony began on November 30, 1993. On December 10, 1993, the jury returned a verdict of "guilty" of premeditated murder in the first degree, finding that Appellant committed the murder to conceal commission of a crime or to protect or conceal his identity; and found aggravating circumstances of robbery in the first or second degree, rape in the first or second degree and kidnapping in the first degree. The penalty phase of the trial began on December 15, 1993, and on December 27, 1993, the jury returned a verdict finding there were not sufficient mitigating circumstances to merit leniency. The trial court on January 28, 1994 imposed upon Appellant a sentence of death.

DISCUSSION

STATUTORY REVIEW

(1) Whether, under RCW 10.95, the capital punishment statute, (a) there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency; (b) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; (c) the sentence of death was brought about the passion or prejudice; or (d) the defendant was mentally retarded.

(2) Whether the proportionality review mandated by RCW 10.95.130 is void for vagueness under the Eighth and Fourteenth

Amendments to the United States Constitution and Article I, §§ 3 and 14 of the Washington Constitution.

Under our capital punishment statue, RCW 10.95, this court must review a death sentence imposed by a trial court to determine (a) whether there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency; (b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; (c) whether the sentence of death was brought about by passion or prejudice; and (d) whether the defendant was mentally retarded.[18] This review is in addition to the basic review on appeal.[19]

Sufficiency of the Evidence

[1] In the sentencing phase the jury in this case concluded the State had proved beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency for Appellant Brown.[20] In deciding whether there is sufficient evidence to support that conclusion, this court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt.[21]

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[18] RCW 10.95.130(2)(a), (b), (c), and (d).

[19] RCW 10.95.130(1).

[20] Clerk's Papers at 1594 (Verdict Form).

[21] *State v. Pirtle*, 127 Wn.2d 628, 682, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

At the penalty phase of his trial, Appellant offered mitigating evidence for the jury to consider in determining his sentence. He presented the testimony of family members who observed that Appellant's mother did not appropriately bond with or "attach" to him as an infant and seemed frustrated and impatient when interacting with him.[22] There was testimony that Appellant suffered a traumatic birth experience,[23] appeared "agitated" as an infant, and began to display behavior characterized as "out of bounds" by the age of two or three.[24] As Appellant grew, his difficult behavior had the effect of putting people off, causing them to reject and avoid him.[25] Testimony was also offered concerning his mother's five marriages,[26] the second of which reportedly involved physical and psychological abuse of both Appellant and his mother.[27] The main focus of Appellant's mitigating evidence was testimony by psychologist Dr. Roland D. Maiuro, Ph.D., who diagnosed Appellant as suffering from antisocial personality disorder, sexual sadism, and manic syndrome.[28] Dr. Maiuro was of the opinion that Appellant also suffered from attention deficit disorder and conduct disorder as a child,[29] perhaps as a result of the trauma he suffered

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[22] Report of Proceedings at 31-32, Dec. 16, 1993.

[23] Report of Proceedings at 24, Dec. 17, 1993. Appellant was born April 16, 1953.

[24] Report of Proceedings at 31, 33, Dec. 16, 1993.

[25] *Id.* at 32-36.

[26] *Id.* at 127-29.

[27] Report of Proceedings at 25-27, Dec. 17, 1993.

[28] *Id.* at 30.

[29] *Id.*

at birth.[30] He also testified that records of lithium therapy while Appellant was in prison in Oregon indicated the drug produced some progress in stabilizing his manic mood disorder, but concluded the state of Oregon did not adequately monitor Appellant's continued use of lithium after he was paroled.[31]

Viewing all the evidence in a light most favorable to the prosecution, a rational trier of fact could have found sufficient evidence to support the jury's conclusion that leniency was not merited in this case. The jury could well have discounted evidence of Appellant's difficult childhood and troubled family life as mitigating factors. Appellant raped, tortured and murdered twenty-one-year-old Holly Washa. Considering such a heinous crime, a rational trier of fact could have concluded that a difficult childhood and troubled family life, faced by many persons who do not resort to criminal behavior, did not constitute sufficient mitigation to deserve leniency in this capital case.

The State offered rebuttal testimony of a psychiatrist, Dr. John R. Brinkley, M.D., who concluded that Appellant does not suffer from organic brain damage.[32] The jury could rationally have believed this testimony, which tended to rebut Appellant's suggestion that his behavioral problems can at least partially be explained by his birth trauma. Dr. Brinkley also testified, based upon his

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[30] *Id.* at 67.

[31] Report of Proceedings at 43-44, Dec. 20, 1993; Report of Proceedings at 70, Dec. 17, 1993.

[32] Report of Proceedings at 110-13, Dec. 21, 1993.

review of Appellant's Oregon prison records, that lithium did not seem to effectively alter Appellant's behavior and concluded he would not have prescribed lithium in Appellant's case.[33] The jury could have rationally believed this testimony as well and discounted as a mitigating factor Appellant's assertion of irresponsibility on the part of the state of Oregon in monitoring his continued use of lithium. In any event, Appellant makes no persuasive argument that any inadequacy on the part of the State of Oregon in monitoring his drug therapy–which is his personal responsibility–mitigates in favor of leniency. The jury doubtless discounted Appellant's diagnosed personality disorders, since those disorders perhaps explained, but did not excuse, his violent behavior.[34]

[2] "The mere presence of mitigating factors does not require that the jury grant leniency, if the jurors are convinced that the circumstances of the crime outweigh the mitigating facts."[35] The jury in this case could reasonably have determined that none of the mitigating factors presented by Appellant were relatively persuasive against Appellant's brutal and tortuous treatment of Ms. Holly C. Washa. Under these circumstances, we conclude there was

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[33] *Id.* at 102-10.

[34] *See State v. Lord*, 117 Wn.2d 829, 906, 822 P.2d 177 (1991) (upholding under RCW 10.95.130(2)(a) a jury's finding that antisocial personality disorder did not mitigate in favor of leniency for a capital appellant, noting that the disorder explained, but did not excuse, appellant's behavior), *cert. denied*, 506 U.S. 856 (1992); *see also State v. Dodd*, 120 Wn.2d 1, 25, 838 P.2d 86 (1992) (diagnosis of severe pedophilia did not merit leniency under RCW 10.95.130(2)(a)).

[35] *Dodd*, 120 Wn.2d at 25.

sufficient evidence to support the determination by the jury that leniency was not merited in this case.

Proportionality

Under RCW 10.95.130(2)(b), this court must conduct a proportionality review to determine:

> Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120[.]

RCW 10.95.120 requires filing of reports "[i]n all cases in which a person is convicted of aggravated first degree murder." This pool of similar cases includes those in which the death penalty was sought and those in which it was not.[36]

Appellant argues that the proportionality review mandated by RCW 10.95.130 is void for vagueness under the Eighth and Fourteenth Amendments to the United States Constitution.[37] He cites in support of this claim the case of *Harris ex rel. Ramseyer v. Blodgett*, in which the United States District Court for the Western District of

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[36] *Lord*, 117 Wn.2d at 907.

[37] Br. Of Appellant at 174.

Washington held that Washington's proportionality review violates procedural due process because RCW 10.95.130 "does not establish adequate standards or guidelines on which the Court or the parties can rely."[38] However, as the State correctly points out, this court considered and rejected that argument in *State v. Brett*[39] and in *State v. Pirtle*.[40] Appellant Brown has not convinced us we should reexamine the issue in this case.

[3] In conducting proportionality review the court is principally concerned with avoiding two systemic problems associated with imposition of capital punishment: random arbitrariness and imposition of the death sentence in a racially discriminatory manner.[41] "Technical inconsistencies in a line-by-line comparison cannot be equated with those core concerns."[42] The focus in this case is on random arbitrariness. There is no claim of racial discrimination.[43]

[4, 5] Proportionality review under RCW 10.95 does not guarantee there will be no variations from case to case, nor that a sentenced of death will

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[38] *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1288 (W.D. Wash. 1994), *aff'd*, *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995).

[39] *State v. Brett*, 126 Wn.2d 136, 207-09, 212, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

[40] *Pirtle*, 127 Wn.2d at 683 (citing *Brett*).

[41] *State v. Gentry*, 125 Wn.2d 570, 655, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995).

[42] *Lord*, 117 Wn.2d at 910 (citing *Pulley v. Harris*, 465 U.S. 37, 54, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)).

[43] Both the appellant and the victim in this case are Caucasian.

be uniformly imposed in all *superficially* similar circumstances.[44] Mathematical precision is unworkable[45] and unnecessary. "There is no constitutional or statutory requirement to ensure an unattainable degree of identity among particular cases which are invariably unique."[46] Instead, we must determine whether a death sentence has been imposed *generally* in similar cases, and not imposed *wantonly* and *freakishly*.[47] We have explored in prior cases the most effective way to reach this determination.[48]

Under the proportionality statute, RCW 10.95.130(2)(b), this court must consider both "the crime and the defendant" in examining "similar cases."[49] In carrying this out, we examine four factors: (1) the nature of the crime, (2) the aggravating circumstances, (3) the defendant's criminal history and (4) the defendant's personal history.[50]

(1) Nature of the Crime

The nature of the crime committed by Appellant Brown was particularly brutal. He

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[44] *Lord*, 117 Wn.2d at 910.

[45] *Id.*

[46] *Brett*, 126 Wn.2d at 213.

[47] *State v. Harris*, 106 Wn.2d 784, 798, 725 P.2d 975 (1986), *cert. denied sub nom. Harris v. Washington*, 480 U.S. 940, 94 L. Ed. 2d 781, 107 S. Ct. 1592 (1987).

[48] *Compare Lord*, 117 Wn.2d at 911 (suggesting a "family resemblances" approach) with *State v. Benn*, 120 Wn.2d 631, 680-693 (suggesting a statistically based approach).

[49] RCW 10.95.130(2)(b).

[50] *Pirtle*, 127 Wn.2d at 686.

kidnapped Ms. Holly C. Washa and robbed, raped and tortured her over a two-day period before killing her. He repeatedly raped her vaginally after he gagged and tied her to a bed in his motel room. At one point he used an aftershave bottle to rape her anally and vaginally. He whipped her naked body with a belt several times. He burned her on various parts of her naked body with a hot hair dryer. He shocked her on various parts of her naked body with the exposed end of an electric extension cord, which he acknowledged was quite painful. Appellant himself described these acts as "torture," explaining that he wanted to gain control over Ms. Washa through intimidation. He strangled her, stabbed her, cut her throat with "three swipes" and left her to die in the trunk of her automobile. She was found dead.

Comparing the facts of this case with "similar cases" reported reveals the nature of this crime is at least as brutal and callous as any other considered by this court. A case fairly comparable to this one is *State v. Dodd*, in which we upheld imposition of the death penalty after proportionality review under RCW 10.95.130(2)(b).[51] In conducting review in that case, the court considered the "extraordinarily vicious and cold-blooded manner" in which the appellant killed his victims, noting that two of them suffered for a significant time before their deaths.[52] Although the *Dodd* case involved three victims instead of one, it also involved physical and mental torture of one of the victims over a prolonged period before death, in a manner similar to the torture inflicted upon Ms. Washa. The victim in *Dodd*, a

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[51] *Pirtle*, 127 Wn.2d at 686.

[52] *Dodd*, 120 Wn.2d at 27.

four-year-old child, was raped and strangled over the court of an entire day, evening, and subsequent morning before he was killed.[53] Ms. Washa's ordeal lasted two days.

In *State v. Gentry*, this court found the death penalty was not disproportionate where the victim experienced terror while being chased through a wooded area before she was sexually assaulted and bludgeoned to death with a rock.[54] While the duration of the victim's suffering in *Gentry* was unknown,[55] the record in this case indicates Ms. Washa experienced substantial pain and terror for almost two days before she was killed by Appellant Brown.

[6] comparing Ms. Washa's suffering to that endured by victims in other cases considered by this court shows that Appellant's crime is at least as vicious as those committed in other cases in which we upheld imposition of the death penalty after proportionality review.[56] "A brutal murder involving substantial conscious suffering of the victim makes

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[53] *Id.* at 8.

[54] *Gentry*, 125 Wn.2d at 657-58.

[55] *Id.* at 657.

[56] *See, e.g.*, Report of the Trial Judge, *State v. Rupe*, No. 81-1-00316-1 (Thurston County Super. Ct. June 7, 1983) (single gunshot wound to head of the victims; no torture); Report of the Trial Judge, *State v. Jeffries*, No. 6488 (Clallam County Super. Ct. Nov. 18, 1983) (multiple gunshot wounds; no torture); Report of the Trial Judge, *State v. Benn*, No. 88-1-01280-8 (Pierce County Super. Ct. June 12, 1990) (gunshot wound to the head of the victims; no torture); Report of the Trial Judge, *State v. Harris*, No. 84-1-01190-6 (Pierce County Super. Ct. Jan. 14, 1985) (gunshot wound to the head and neck of the victim; contract killing; no torture).

the murderer more deserving of the death penalty."[57]

(2) Aggravating Circumstances

[7] The jury found Appellant "guilty" of premeditated first-degree murder, specifying four aggravating facts. It found he committed the murder of Ms. Washa (1) to protect or conceal his identity; (2) in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree; (3) in the course of, in furtherance of, or in immediate flight from rape in the first or second degree; and (4) in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree.[58] Only one aggravating factor is needed for imposition of the death penalty unless the person charged is found to be mentally retarded.[59] There is absolutely no suggestion in the record that Appellant was retarded. He has tested in the gifted intelligence range (an IQ of 144). The aggravating factors found by the jury in this case sufficiently support our conclusion that Appellant's sentence of death is not disproportionate when compared to other cases in which the death penalty was imposed.[60]

(3) Criminal History

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[57] *Gentry*, 125 Wn.2d at 657.

[58] Clerk's Papers at 1451-52 (Special Verdict Form B).

[59] RCW 10.95.030(2).

[60] *See, e.g.*, Report of the Trial Judge, *State v. Gentry*, (one aggravating factor: concealment of identity); Report of the Trial Judge, *State v. Benn* (one aggravating factor: multiple victims); Report of the Trial Judge, *State v. Harris* (one aggravating factor: contract murder); Report of the Trial Judge, *State v. Jeffries* (two aggravating factors: multiple victims, concealment of a crime).

Appellant's death sentence is not disproportionate when his criminal history is considered. His record includes prior convictions for (1) assault with a deadly weapon, (2) grand theft, (3) attempted assault in the first degree, (4) assault in the second degree, (5) attempted murder in the first degree, (6) aggravated mayhem, (7) torture, (8) false imprisonment, and (9) robbery in the first degree.[61] His criminal record shows a history of violence towards others. His criminal history is comparatively more extensive than that of other appellants who received the death penalty.[62]

(4) Personal History

[8] The subjective factors in Appellant's personal history are not sufficient to override the circumstances and consequences of his crime. "The role of mitigation evidence is to reduce culpability for a crime that has already been proved."[63] Appellant's mitigation evidence ranged from testimony about his troubled and sometimes abusive family lift to medical testimony concerning his diagnosed personality disorders.[64] Although commonly asserted, a history of abuse as a child seldom affects

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[61] Report of the Trial Judge, *State v. Brown*; Report of Proceedings at 45-46, Dec. 15, 1993.

[62] *See* Report of the Trial Judge, *State v. Rupe* (no prior criminal convictions); Report of the Trial Judge, *State v. Harris* (two prior convictions: assault, manslaughter); Report of the Trial Judge, *State v. Benn* (many misdemeanors and three prior convictions: first degree theft, grand larceny, first degree theft).

[63] *Pirtle*, 127 Wn.2d at 688.

[64] For a more detailed and thorough description of Appellant's mitigation evidence, see the discussion on "Sufficiency of the Evidence," *supra* at 591.

the outcome of aggravated first degree murder cases.[65] Also, we have upheld death sentences imposed on appellants with medically diagnosed personality disorders similar to, or more severe than, Appellant's.[66]

Conclusion on Proportionality

Appellant's death sentence is not disproportionate to sentences imposed in similar cases. The factors employed by this court in considering both the "crime and the defendant" justify our conclusion that Appellant Brown's case is sufficiently similar to other cases in which the death penalty has been imposed and upheld on appeal. The nature of his crime is a brutal and heinous as any considered by this court. His criminal history is extensive and shows a pattern of violence towards others. The jury found numerous aggravating factors in convicting him of aggravated first degree murder. His mitigating evidence was doubtless not sufficient to convince the jury that he merited leniency, the consequence being that he would be sentenced to death. Under these circumstances, we conclude the death sentence imposed upon Appellant Brown was not disproportionate to the crime committed and that it was not wantonly and freakishly imposed.

Passion or Prejudice

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[65] *Pirtle*, 127 Wn.2d at 688.

[66] *See, e.g., Dodd*, 120 Wn.2d at 11 (severe homosexual pedophilia); *Lord*, 117 Wn.2d at 906 (antisocial personality disorder); *State v. Rice*, 110 Wn.2d 577, 592-96, 757 P.2d 889 (1988) (evidence presented of "deep personality disorder and disordered childhood," but "no evidence of any organic central nervous system disease or intracranial abnormalities.").

Appellant Brown presents no independent argument that his sentence was the result of passion or prejudice. He claims only "the jury was not properly advised of the 'crime' it was asked to weigh against the mitigating factors," and that the jury was not instructed "that the deterrence of others, the cost of incarceration, and the purely emotional response to . . . the heinousness of the crime or the evil of the defendant should not be part of the weighing process."[67] From this Appellant somehow concludes the jury based its sentence upon an unfavorable emotional response to him and not upon reason.[68] There is no evidence in the record to support that claim. We therefore conclude the jury's verdict in the sentencing phase was not based upon passion or prejudice.

Mental Retardation

RCW 10.95.030(2) proscribes imposition of capital punishment upon persons who were mentally retarded at the time they committed the crimes for which they are being sentenced. To be considered "mentally retarded" under the statute a person must have, among other things, "significantly subaverage general intellectual functioning," which is defined as achieving an IQ of 70 or below.[69] Appellant does not claim he is mentally retarded. Nor is there even the slightest evidence to support such a claim. To the contrary, the record shows he had a measured IQ of 144 in the seventh or eighth grade, placing him at a

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[67] Br. of Appellant at 179.

[68] *Id.*

[69] RCW 10.95.030(2)(a), (c).

gifted level of intelligence.[70]

PROSECUTORIAL MISCONDUCT

(3) Whether statements made by prosecuting attorneys during the guilt and penalty phases of the trial constituted prosecutorial misconduct which denied Appellant a fair trial.

[9, 10] Appellant claims the prosecuting attorney engaged in prosecutorial misconduct which deprived him of a fair trial. He cites instances in which he claims the prosecutor made personal or emotional appeals to the jury. Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.[71] To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict.[72]

[11-13] A prosecuting attorney's allegedly improper remarks must be reviewed in the contest of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.[73] Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative

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[70] Report of Proceedings at 114, Dec. 20, 1993.

[71] *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

[72] *Pirtle*, 127 Wn.2d at 672.

[73] *Russell*, 125 Wn2d at 85-86.

instruction to the jury.[74] "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."[75]

Opening Statement (Guilt Phase)

Appellant first complains of two statements made by the prosecuting attorney during the State's opening statement in the guilt phase of the trial. In suggesting the jury could come to know the deceased Ms. Holly C. Washa only through the testimony of witnesses, the prosecutor stated:

> I've sort of lived with Holly [Washa] over the last two years or so preparing for this case, and perhaps I've personalized her a little bit. Maybe by the time this trial is over, you will know enough about her that maybe you'll personalize her a little bit. The one thing I do hope though is that justice can be done by the end of this trial and we can put Holly [Washa] to rest.

The defense did not object to this statement.

Near conclusion of the State's opening statement, the prosecutor stated:

> I want to assure you at the end of this case you're not going to look at me and say, "Did he do it?" I suggest you're going to look at me and you're going to say, "How could he have done it?" And, you know, that's one question that I won't be able to answer for you. I don't have to answer it for you. I can't imagine how any person could have done this to Holly

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[74] *Id.* at 86.

[75] *Id.* at 85.

> Washa or to any other living human being. How could he have done it?

The defense did not object to this comment.

Upon conclusion of its opening statement, the defense moved for a mistrial based upon the prosecuting attorney's personalized and emotional appeal to the jury in his opening statement. The defense in the alternative requested a remedial instruction to the jury. The trial court denied the motion for mistrial, but did instruct the jury that "counsels' opinions, statements, whatever else they say in openings are certainly not evidence."

[14, 15] Denial of a motion for mistrial for alleged prosecutorial misconduct lies within the sound discretion of the trial court.[76] This court will not disturb that decision absent an abuse of discretion.[77] Here, the trial court did not abuse its discretion because the prosecutor's statements were not improper. Even assuming they might have been improper, there was no prejudice to Appellant. Besides, the court timely instructed the jury it was not to consider counsel's opinions or statements as evidence.

[16] Appellant has not sustained his burden of establishing that either of the statements were improper. The first statement was introductory in nature and focused on the prosecutor's preparation for trial. The second statement merely informed the jury what the state's evidence was expected to show. There is no indication either statement was made to elicit an emotional response from the jury. Neither

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[76] *Id.* at 86.

[77] *Id.*

was improper.

[17. 18] Assuming the two statements might have been improper, Appellant has not established he was prejudiced by either of them. The context in which they were made demonstrates that Appellant suffered no prejudice which would have affected the jury's verdict. The trial court properly instructed the jury that remarks by counsel in opening statements were not evidence. In fact, the defense made similar remarks in *its* opening statement. Defense counsel told the jury that remarks by counsel in opening statements were not evidence. In fact, the defense counsel told the jury that "like the [prosecution] has personalized this case for a couple of years with Holly Washa, we have done so with Mr. Brown . . . ." Defense counsel also stated in the jury's presence that Appellant's killing of Ms. Washa was "incredibly horrible, brutal and bizarre" and asked the jury how any person could be so "twisted, so full of bottled up rage to commit this type of crime." Appellant now claims error by the State for less provocative statements than those made by his own counsel in opening statement. This weakens the claim the remarks of the prosecutor were prejudicial and resulted in denial of a fair trial for Appellant.[78]

Closing Argument (Guilt Phase)

Appellant Brown next takes issue with two statements made by the prosecuting attorney during closing argument in the guilt phase of the trial.

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[78] *See Russell*, 125 Wn.2d at 89 (incorporation of improper statements made by prosecuting attorney into defense argument weakened defendant's contention the statements denied him a fair trial).

The first statement was made near the beginning of the State's closing argument when the prosecutor referred to Appellant's motive for murdering Ms. Washa: "He saw Holly Washa as a vehicle for getting cash so that he could get to Susan Schnell." The trial court overruled a defense objection.

The second statement was made later in closing argument when the prosecuting attorney was urging the jury to reject the lesser included offense of murder in the second degree. The prosecutor asked the jury not to "negotiate" with Appellant:

> The defendant does not deserve a compromise. You should not negotiate with Cal Brown. You should not even think about negotiating with Cal Brown. Cal Brown didn't allow Holly Washa to negotiate with him. She didn't get to negotiate for her life. She didn't get to negotiate for her money. She didn't get to negotiate for her dignity. You should refuse any thought of negotiating with Cal Brown.

Defense counsel objected to this statement. The trial court overruled the objection and reminded counsel the jury had been instructed that counsel's statements were argument and not testimony or evidence.

The defense moved for a mistrial at the conclusion of the State's closing argument, claiming the prosecutor's statements improperly appealed to the passion or prejudice of the jury. The defense in the alternative requested a curative instruction to the jury. The trial court denied the defense motion and noted, out of the presence of the jury, that "the argument of counsel [for the prosecution] was within

reasonable bounds. The jury has been instructed . . . . They have been told the arguments of counsel are not testimony, not evidence."

[19] The trial court did not abuse its discretion in denying the defense motion for a mistrial. The prosecuting attorneys' statements were not improper. "In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence."[79] Both statements complained of were reasonably supported by evidence admitted in trial. Appellant admitted in his recorded statement to California police officers that he kidnapped Ms. Washa because he was out of money and wanted to rob her so he could go to California. He also admitted he forced her to write and cash checks for him. Under this evidence, it was reasonable for the prosecuting attorney to state in closing argument that Appellant had a financial motive for abducting Ms. Washa. Similarly, there was substantial evidence to support the prosecuting attorney's argument to the jury that the lesser included offense of second degree murder would not be appropriate in Appellant's case. Counsel's description of the lesser included offense as a "compromise," while overly simplistic, did not constitute misconduct. Both statements were fair comments on the evidence. Any prejudicial effect was minimized by the court's instruction to the jury.

Rebuttal Closing Argument (Guilt Phase)

Upon completion of the prosecuting attorney's rebuttal closing argument, the defense moved for a

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[79] *Gentry*, 125 Wn.2d at 641.

mistrial, claiming three instances of misconduct.

[20] The first instance was when the prosecuting attorney described as "ludicrous" the defense claim that Ms. Holly C. Washa had been asleep in Appellant's motel room while he made telephone calls to Ms. Susan J. Schnell and for airline reservations. Defense counsel's objection to this characterization was overruled. The defense made the claim in response to the State's theory that Appellant killed Ms. Washa to prevent her from informing the police of his future plans and whereabouts. The defense argued it was not necessary for Appellant to eliminate Ms. Washa as a witness because she was asleep during the telephone calls and was thus not aware of his plans. The remark by the prosecuting attorney was not improper. "It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory."[80] As an advocate, the prosecuting attorney is entitled to make a fair response to the arguments of defense counsel.[81] The prosecutor's characterization of the defense theory as "ludicrous" was reasonable in light of the evidence. Appellant admitted raping and torturing Ms. Washa over a prolonged period of time. It was the prosecution's contention that, under those circumstances, she was not likely asleep while Appellant was anywhere nearby. The use of the word "ludicrous" was simply editorial comment by the prosecuting attorney which was a strong, but fair, response to the argument made by the defense.

The second instance was the prosecuting

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[80] *Russell*, 125 Wn.2d at 87.

[81] *Id.*

attorney's characterization of Appellant as one who needs to "control." The evidence at trial supports that characterization. Appellant himself said in his recorded statement that he used torture to gain "control" over Ms. Washa. From this evidence alone the prosecuting attorney could reasonably draw and express the inference that Appellant used control to accomplish his purposes. Under these circumstances, use of the word "control" was not improper.

The third instance focuses on the prosecutor's use of transcripts of Appellant's recorded statements to the Palm Springs police officers. Appellant argues it was improper for the prosecuting attorney to read from the transcripts of the tapes during rebuttal because only the tapes, and not the transcripts, were admitted into evidence. This argument is without merit.

[21] The jury was informed the transcripts were not evidence of Appellant's statements. When the jurors listened to the tapes during trial, they were provided with transcripts to assist them in following the words. They were instructed at that time, however, that the words on the tapes, not the transcripts, were evidence of Appellant's statements, and that any inconsistency between the two should be resolved by reference to their collective memory of the contents of the tapes. They were reminded of this instruction again by the court after a side-bar conference requested by the defense immediately prior to reference to the transcripts by the prosecuting attorney. Under these circumstances, it was not improper for the prosecuting attorney to repeat portions of Appellant's statements by reading from the transcripts. Because the actual tapes were

admitted into evidence a trial, as State's Exhibit 89, Appellant was not prejudiced by any reference to portions of his statements during rebuttal since the jury had already heard the tapes. The trial court's denial of the motion did not constitute an abuse of discretion because none of the prosecuting attorney's statements or actions during rebuttal was improper.

Closing Argument (Penalty Phase)

Appellant claims the prosecuting attorney made two statements during closing argument in the penalty phase of the trial which constituted misconduct. The first was near the beginning of the state's closing argument when the prosecuting attorney stated:

> The legislature enacted the death penalty law so that it would be used in the most serious murder cases. So that in cases where the crime calls out for a death sentence, the jury, in its discretion and its common sense and its good judgment, would impose such a sentence. *I suggest to you that this crime screams out for the death sentence.*

(Emphasis added.)

Near the conclusion of the prosecutor's rebuttal closing argument, the prosecuting attorney stated:

> I talk about the reasons why the death penalty is appropriate. And one of the reasons it is appropriate, is just exactly the acts that he [Appellant] carried out, that is one of the reasons it's appropriate.
>
> *If the death penalty is not appropriate in this case, I'd ask you to try to think of a case*

that it would be appropriate in, considering his acts, considering his evil.

(Emphasis added.)

Because the defense did not object to either statement, this court will consider any error waived unless either remark was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.[82] Reversal is required only if there is a substantial likelihood either statement affected the jury's verdict.[83]

Both statements were supported by the evidence and thus were not improper. Appellant was convicted of committing a brutal murder with several aggravating factors. There was overwhelming evidence to support his conviction. Under these circumstances, the prosecuting attorney had wide latitude to make the argument that the evidence strongly supported imposition of the death penalty.[84] While the words used to make that argument (such as "screams out" and "evil") may be somewhat dramatic, they do not constitute misconduct warranting reversal in this case.

TESTIMONY OF SUSAN J. SCHNELL

(4) Whether the trial court erred in admitting the testimony of Ms. Susan J. Schnell, surviving victim in a criminal encounter with Appellant in California.

Evidence Rule 404(b)

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[82] *Id.* at 86.

[83] *Id.*

[84] *See Gentry*, 125 Wn.2d at 641.

Appellant claims the trial court erred in admitting the testimony of Ms. Susan J. Schnell under ER 404(b) in both the guilt and penalty phases of his trial. He argues that the reasons offered by the trial court for admitting the testimony were not adequate and that admission of the evidence violated his double jeopardy rights.

Prior to trial Appellant sought to exclude Ms. Schnell's testimony as inadmissible character evidence under ER 404(b). Acknowledging that the testimony was prejudicial to Appellant, the trial court concluded its probative value substantially outweighed any unfair prejudice. The court ruled the testimony was admissible because it placed in context the c rime for which Appellant was charged by describing the "fabric of events" or "res gestae" surrounding Ms. Holly C. Washa's murder. It also found the testimony was probative of intent, premeditation and the aggravating factors.

Appellant asked the trial court to reconsider its ruling admitting Ms. Schnell's testimony. The court adhered to its prior ruling and reemphasized the testimony was admissible as res gestae evidence and was probative of motive, intent and premeditation. It noted the testimony was also probative of the issue whether Appellant's acts constituted a common scheme or plan. The court again acknowledged the prejudicial nature of the testimony, but concluded its probative value far outweighed any unfair prejudice.

Just before Ms. Schnell testified during the guilt phase of the trial, the court did, however, instruct the jury concerning the limited basis for admitting her testimony. The court stated:

> Ladies and gentlemen, regarding the evidence you are about to hear, the Court advised you now that you may consider evidence of the defendant's conduct towards Ms. Susan J. Schnell only insofar as it bears on the issues of premeditation, intent and the four aggravating factors charged in the crime against Ms. Washa. You may not consider such evidence for any other purpose. In particular you must not use it to draw a conclusion about the defendant's *character or propensity to commit criminal acts.*

(Emphasis added.)[85]

Jury instruction 8, given by the court, was substantially similar to that oral instruction.[86]

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[22] Under Evidence Rule 404(b) evidence of other misconduct is not admissible to show a defendant is a "criminal type."[87] However, crimes or misconduct other than the acts for which a defendant

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[85] Report of Proceedings at 104-05, Dec. 6, 1993.

[86] *See* Clerk's Papers at 1420.

[87] *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

is charged may be admitted for other reasons.[88] In addition to the non-exhaustive list of exceptions identified in Rule 404(b) itself, this court has recognized a res gestae or "same transaction" exception to the rule.[89] Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurance.[90] Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury."[91] Additionally, the rule itself allows evidence of other misconduct to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[92]

[23, 24] To admit evidence of other crimes or misconduct under ER 404(b), the trial court must identify on the record the purpose for which it is admitted.[93] Even if otherwise admissible for a valid purpose, Rule 404(b) evidence still must be relevant to a material issue and its probative value must

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[88] *Id.*

[89] *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

[90] *Id.*

[91] *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

[92] ER 404(b); *see also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing exceptions).

[93] *Pirtle*, 127 Wn.2d at 649; *Powell*, 126 Wn.2d at 258; *Lane*, 125 Wn.2d at 832 (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

outweigh its prejudicial effect.[94] Evidence is relevant if it makes the existence of a consequential fact more or less probably.[95] The trial court must also find by a preponderance of the evidence that the claimed misconduct occurred.[96] The decision to admit evidence of other crimes or misconduct lies within the sound discretion of the trial court[97] and will not be disturbed on appeal absent an abuse of discretion.[98] There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons.[99]

On December 6, 1993, Ms. Susan J. Schnell testified on direct examination concerning the circumstances leading to her encounter with Appellant. She related how she and Appellant first met and eventually made plans to spend Memorial Day weekend together in Palm Springs. She testified about Appellant's assault upon her in the hotel in Palm Springs:

Suddenly during the back rub he jerked

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[94] *Lane*, 125 Wn.2d at 831; *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); *Saltarelli*, 98 Wn.2d at 361-62; *see also Pirtle*, 127 Wn.2d at 649.

[95] *Saltarelli*, 125 Wn.2d at 361-62; *Powell*, 126 Wn.2d at 259.

[96] *Pirtle*, 127 Wn.2d at 649.

[97] *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on rehearing*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906, 80 A.L.R.4th 989 (1989).

[98] *Pirtle*, 127 Wn.2d at 648; *Lane*, 125 Wn.2d at 831; *Laureano*, 101 Wn.2d at 764.

[99] *Powell*, 126 Wn.2d at 258.

my arm behind my back very fast in a brutal way. My arms were jerked. As he was jerking my arms back, he said, "Don't scream." And at that point I did scream. And when I did scream, he slit my throat.[100]

Ms. Schnell also testified about Appellant's sexual assault upon her:

A. After the ba[n]dages, he had me sideways on the bed. And he was tying my legs with panty hose and turned different parts of the, would move the handcuffs from my hands to my feet and change the . . . place, change the restraints

Q. Did the defendant do anything more after that?

A. He did sexually assault me.

Q. Is this something that is difficult to talk about?

A. Yes. It is difficult to talk about.

Q. Would you tell the jury the nature of the sexual assault?

A. He shaved my hair off.

Q. He shaved the hair located, where?

A. My pubic hair. And had intercourse with me and asked me to perform oral sex on him.[101]

There was testimony from Ms. Schnell that,

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[100] Report of Proceedings at 135, Dec. 6, 1993.

[101] *Id. at 141.*

following the sexual assault, Appellant forced her to write several checks to him upon her account. She recalled that he rejected the first two checks because she had not matched to his satisfaction her signature on the checks with the signature on her driver's license.[102] On cross examination, Ms. Schnell testified that, prior to Appellant's initial assault upon her, they engaged in some consensual sex. She stated they kissed and fondled each other, and that Appellant performed oral sex on her.[103]

There was no abuse of discretion in admitting the testimony of Ms. Susan J. Schnell. The trial court identified on the record the reasons for its admission under ER 404(b). The testimony was relevant to material issues in the case relating to premeditation, intent, and the four aggravating factors. It also qualified as res gestae evidence because it provided the jury with a more complete picture of events surrounding the crimes committed against Ms. Holly C. Washa. The trial court properly weighed the probative value of the testimony against its prejudicial effect and concluded its probative value substantially outweighed its prejudicial effect.

Admission of the testimony of Ms. Schnell was proper under ER 404(b) because it was probative of Appellant's motive, intent, preparation and plan to kidnap, rob, and murder Ms. Holly C. Washa. It was the State's theory at trial that Appellant used Ms. Washa to finance his trip to join Ms. Susan J. Schnell in California. He was in contact with Ms. Schnell while he held Ms. Washa captive. Evidence of his encounter with Ms. Schnell supported the

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[102] *Id.* at 141-42.

[103] *Id.* at 154-55.

State's theory. That evidence also supported the State's argument that Appellant intended and premeditated Ms. Washa's killing to conceal his crimes so he could go to California to meet Ms. Schnell. Evidence that Appellant slit the throats of two captive women in two days tended to rebut his contention that his killing of Ms. Washa was merely an impulsive "spur of the moment" act.

The testimony of Ms. Schnell was similarly probative on the issue of Appellant's rape of Ms. Washa. Appellant contended at trial that the sexual contact between him and Ms. Washa was consensual. Ms. Washa was dead and not available to relate the true facts. Evidence of a sexual assault against Ms. Schnell would tend to rebut Appellant's contention. Just two days after his assault upon Ms. Washa, Appellant sexually assaulted Ms. Schnell in a markedly similar manner. Both women were bound with the same pair of handcuffs, gagged, and had their pubic hair shaved by Appellant before he raped them. Because of these similarities, evidence of the attack on Ms. Schnell made it more probable that the sexual contact between Appellant and Ms. Washa was by forcible compulsion, and less probable that it was consensual.

[25, 26] Although Appellant was not actually convicted of sexually assaulting Ms. Schnell in California, her testimony concerning the entire incident was supported by a preponderance of the evidence. Appellant pleaded "guilty" in California to the crimes of attempted murder in the first degree, aggravated mayhem, torture, robbery in the first degree, and false imprisonment with Ms. Schnell as

his victim.[104] This satisfies the preponderance of the evidence standard with respect to those crimes. Ms. Schnell's testimony concerning her sexual encounter with Appellant satisfies this standard as well. Her description of the assault upon her was consistent with the sexual assault upon Ms. Holly C. Washa. Although she testified she and Appellant earlier engaged in some consensual sexual activity, that activity occurred *prior* to Appellant's assault upon her. After having her throat cut, her pubic hair shaved, and being bound and gagged by Appellant, it is not reasonable to believe she consented to any further sexual activity with him. Under these circumstances, her testimony concerning the sexual assault was sufficient to satisfy the preponderance of the evidence standard.

The testimony of Ms. Schnell was also admissible as res gestae evidence because the crimes against Ms. Washa and against her were linked in significant ways. Appellant's kidnapping, assault and robbery of Ms. Schnell was similar to the crimes he committed against Ms. WAsha. Appellant sexually assaulted both women in a similar manner. He forced both women to write checks to him upon their respective bank accounts. He also used the same weapon to threaten both women into submission and to slit their throats. From this we can reasonably conclude that Appellant was engaged in an ongoing criminal enterprise of restraining, raping, robbing, and assaulting Ms. Washa and Ms. Schnell. Additionally, while Appellant was committing the crimes against Ms. Washa in Washington, he was also contacting Ms. Schnell to

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[104] Report of Proceedings at 45-46, Dec. 15, 1993.

finalize his plans to meet her in California. He admitted to Palm Springs police officers that he kidnapped, assaulted, robbed and abused Ms. Washa because he needed money to get back to California, where he ultimately met Ms. Schnell and embarked on a similar pattern of criminal behavior. The events in California culminated a sequence of events which began in Washington with the crimes involving Ms. Holly C. Washa as victim. Under these circumstances, the jury was entitled to know about the events in Palm Springs with Ms. Schnell as victim in order to have a more complete picture of the circumstances surrounding Ms. Washa's death.

[27, 28] Appellant argues that Ms. Schnell's testimony did not qualify as res gestae evidence because he committed the crimes against her more than two days after he committed the crimes against Ms. Washa and "hundreds of miles away in another state." This argument is without merit for two reasons. First, Rule 404(b) applies to evidence of other crimes or misconduct regardless whether they occurred *before or after* the conduct for which a defendant is currently charged.[105] Second, while res gestae evidence is, as Appellant argues, restricted to providing the *immediate* context within which a charged crime took place,[106] geographical distance

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[105] *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on rehearing*, 113 Wn.2d 520, 782 P.2d 1013 (1989) (citing TEGLAND); 5 KARL B. TEGLAND, WASHINGTON PRACTICE EVIDENCE § 114, at 386 (3d ed. 1989).

[106] *See Lane*, 125 Wn.2d at 831; *see also* 1 MCCORMICK ON EVIDENCE § 190, at 799 (John W. Strong, ed., 4th ed. 1992) (res gestae evidence admissible "[t]o complete the story of

and the passage of two days between these two similar and connected crimes do not defeat immediacy of contact in this case.[107]

Appellant claims that even if the evidence of his crimes against Ms. Susan J. Schnell was admissible for a valid purpose, it was too prejudicial to be admitted. He concludes that because it was admitted, he is now entitled to a new trial. This claim, too, is without merit. The trial court considered the prejudicial nature of Ms. Schnell's testimony and determined its probative value outweighed that prejudice. As a cautionary measure, the court gave the jury limiting instructions which explained that the testimony was not to be considered as character or propensity evidence.

Double Jeopardy

Appellant maintains that permitting the jury to hear Ms. Schnell's testimony placed him twice in jeopardy for the same offense in violation of the state and federal constitutions.

[29] There is no violation of double jeopardy in this case. A defendant is subjected to multiple prosecutions for the same offense in violation of double jeopardy when (1) the charged offenses have identical statutory elements or one is a lesser included offense of the other, and (2) conduct constituting an offense for which the defendant has already been prosecuted will be used to establish an

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the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings." (footnote omitted)).

[107] *See Lane*, 125 Wn.2d at 833 (evidence of events occurring within a two- or three-day period of the charged crime admissible under res gestae exception to ER 404(b)).

essential element of an offense charged in a subsequent prosecution.[108]

[30] Appellant does not minimally satisfy this double jeopardy test because he was not prosecuted in Washington for the same conduct for which he was prosecuted in California. In California he was charged with and pleaded "guilty" to attempted murder in the first degree, aggravated mayhem, torture, robbery in the first degree and false imprisonment, with Ms. Susan J. Schnell as his victim. In this case, he was prosecuted for the crimes he committed in the state of Washington with Ms. Holly C. Washa as his victim.[109]

TESTIMONY OF JAN M. GRAY AND BRIEANNA C. WEST

(5) Whether the trial court erred in admitting the testimony of Ms. Jan M. Gray and Ms. Brieanna C. West, who had non-criminal encounters with Appellant in California and Washington.

Appellant argues that the trial court abused its discretion and committed reversible error by admitting the testimony of Ms. Jan M. Gray and Ms.

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[108] *State v. Brett*, 126 Wn.2d 136, 181, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996); *State v. Laviollette*, 118 Wn.2d 670, 676, 826 P.2d 684 (1992) (citing *Grady v. Corbin*, 495 U.S. 508, 521, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990)).

[109] Along with his double jeopardy claim, Appellant also argues his due process rights were violated when the trial court refused to "tell the jury [in the penalty phase] it could not consider the Susan Schnell facts as well as the uncharged sexual offense in deciding whether to impose death or life without parole." Br. of Appellant at 129.

Brieanna C. West during the guilt phase of his trial. He claims the court did not identify the relevance of this evidence and also did not balance its probative value against its prejudicial effect as required by ER 404(b).

During the trial the defense moved to exclude Ms. West's and Ms. Gray's testimony as irrelevant. It also argued their testimony was prejudicial because it might lead the jury to conclude Appellant was stalking Ms. West as another potential victim.[110] The court concluded the testimony of Ms. West and Ms. Gray did not constitute ER 404(b) character evidence because Appellant's contact with both women involved no crime or misconduct.[111] It also stated that:

> The State will not be allowed to argue that Ms. West or Ms. Gray were other potential victims that were simply waiting to happen . . . but I think that all of this information goes to setting the ground work, setting the scene . . . in front of the jury so that they can look at all the evidence before having to make the very difficult decisions in this case.[112]

Following the testimony of both Ms. West and Ms. Gray, the court orally instructed the jury there was no indication or allegations that Appellant intended to harm either of the two women. The court also instructed the jury that the testimony was presented "simply to place Mr. Brown's actions and

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[110] Clerk's Papers at 1089-90.

[111] Report of Proceedings at 10, Nov. 16, 1993.

[112] *Id.* at 10-11.

activities in some sort of logical context. You are not to consider the testimony for any other eason."[113] The jury was similarly instructed at the conclusion of the guilt phase of the trial.[114]

[13, 32] The admission of evidence lies within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.[115] The trial court did not abuse its discretion in allowing the testimony of Ms. Gray and Ms. West. The testimony was relevant because it established background information on Appellant's trip to Seattle where he committed the crimes in this case. He was not prejudiced by the testimony of Ms. Gray and Ms. West because his contact with both women involved no crime or misconduct. Thus, it did not come within the purview of ER 404(b).[116] Any

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[113] Report of Proceedings at 77, Nov. 30, 1993.

[114] Clerk's Papers at 1419. See Jury Instruction Number 7.

[115] *Laureano*, 101 Wn.2d at 764.

[116] Appellant's reliance on *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993) for the proposition that Rule 404(b) applies to this testimony is misplaced. In *Halstien*, the defendant was convicted of burglary with a finding of sexual motivation, and the trial court had ruled that evidence of the defendant's prior contacts with the victim did not constitute prior bad acts under ER 404(b). *Halstien*, 122 Wn.2d at 125-26. This court held that prior bad acts included "acts that are merely unpopular or disgraceful" and concluded that defendant's prior contacts with the victim fell within the scope of Rule 404(b). *Id.* at 126. However, the defendant in that case had made the victim feel uncomfortable in their prior contacts by "watching her," asking unwelcome and inappropriate questions, and giving her "the creeps." *Id.* at 112-13. In this case, neither Ms. Gray nor Ms. West expressed any similar concerns regarding their prior contacts with Appellant.

possibility the jury might have speculated that Appellant was stalking Ms. West or Ms. Gray was obviated by the trial court's limiting instructions.[117]

MIRANDA RIGHTS

(6) Whether Appellant was adequately advised of his Miranda rights before making statements to Palm Springs, California police detectives.

[33] Appellant contends he was not adequately advised of his *Miranda* rights by the Palm Springs police before making his recorded statements and that those statements therefore should have been suppressed. He claims the warnings required under *Miranda v. Arizona* were inadequate because they did not explicitly inform him of his right to speak with an attorney *before* questioning.[118] Although Appellant's trial counsel did not move to suppress his statements to the Palm Springs police at trial on the grounds of inadequate advisement of *Miranda* rights, Appellant may nevertheless raise this issue for the first time on appeal.[119]

On May 27, 1991, Appellant was questioned

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[117] Appellant also argues that admission of the testimony of Ms. Gray and Ms. West "for eventual use in the penalty phase without the appropriate limiting instruction . . . permitted the jury to consider Mr. Brown's propensity to 'stalk' other victims besides Holly Washa." Br. of Appellant at 132. The testimony did not suggest Appellant was stalking either woman. And the court's limiting instruction on the matter, given twice to the jury, made that point sufficiently clear.

[118] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

[119] *See* RAP 2.5(a)(3).

for the first time by Palm Springs police detectives. One of the detectives informed Appellant of his rights before questioning began:

> **Detective:** Basically, you have the right to remain silent. Anything you say can and may be used against you in court. *You have the right to an attorney and have him present while you're being questioned*, and if you can't afford one, one will be appointed for you by the court.
>
> **Appellant:** All right.
>
> **Detective:** Okay, having those rights, all of those rights . . . .
>
> **Appellant:** Okay.
>
> **Detective:** Are you willing to talk?
>
> **Appellant:** I'm willing to talk.
>
> **Detective:** Are you willing to talk with us Cal?
>
> **Appellant:** Okay.

(Emphasis added.)[120]

Later that day, the Palm Springs detectives conducted another interview with Appellant, at the beginning of which he was again advised of his rights:

> **Detective:** I want to make sure that I've advised you of your rights on their case [King County's] too. You have the right to remain

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[120] Ex. 89, tape 1, side 1.

silent. Anything you say can and may be used against you in court.

. . . .

Detective: *You have the right to an attorney and to have him present when you're being questioned.* If you cannot afford one, one will be appointed for you.

. . . .

Detective: Do you understand those rights?

Appellant: I understand those rights?

(Emphasis added.)[121]

On May 28, 1991, the detectives spoke with Appellant at his request and he was again advised of his rights:

Detective: Okay. Cal, we're here because you asked us to come in and before we talk to you, I go over your rights every time.

Appellant: Okay.

. . . .

Detective: You have the right to remain silent. Anything you say can and may be used against you in court. *You have the right to an attorney and to have him present when you're being questioned.* If you cannot afford an attorney, one will be appointed for you if you

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[121] Ex. 89, tape 2, side 1.

desire.

Appellant: Right.

Detective: Do you understand those rights?

Appellant: Right.

(Emphasis added.)[122]

Under *Miranda*, a suspect in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[123] The right to the presence of an attorney includes the right to consultation with counsel both *before and during* questioning.[124] Violation of any of the *Miranda* requirements results in exclusion of any statement given by the suspect.[125]

[34] However, there is no requirement that the warnings be given in the precise language stated in *Miranda*. No "talismanic incantation" is required.[126] "Reviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining

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[122] Ex. 89, tape 3, side 1.

[123] *Miranda*, 86 S. Ct. at 1630.

[124] *See Duckworth v. Eagan*, 492 U.S. 195, 109 S. Ct. 2875, 2879, 106 L. Ed. 2d 166 (1989); *Cooper v. Dupnik*, 963 F.2d 1220, 1239-40 (9th Cir.), *cert. denied*, 506 U.S. 953 (1992); *State v. Creach*, 77 Wn.2d 194, 461 P.2d 329 (1969).

[125] *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 1292, 84 L. Ed. 2d 222 (1985).

[126] *Duckworth*, 109 S. Ct. at 2880.

the terms of an easement."[127] The question is whether the warnings reasonably and effectively conveyed to a suspect his rights as required by *Miranda*.[128]

The case of *People of the Territory of Guam v. Snaer* is on point. There, the United States Court of Appeals for the Ninth Circuit held this warning was adequate under *Miranda*: "You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned."[129] The defendant in that case argued, as Appellant does here, that his *Miranda* warnings were inadequate because he had not been specifically advised he had a right to consult with an attorney *before* being questioned.[130] The court rejected that claim and concluded the first part of the warning, when read with the latter part, adequately conveyed notice of the right to consult with counsel *before* questioning.[131] In reaching that conclusion, the court noted that "[i]f a defendant has been told the substance of his constitutional rights, it is not fatal if irrelevant words or words with no independent substance are omitted."[132]

[35] As with the warnings at issue in *Snaer*,

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[127] *Id.*

[128] *Id.* at 2880.

[129] *People of the Territory of Guam v. Snaer*, 758 F.2d 1341, 1342-43 (9th Cir.), *cert. denied*, 474 U.S. 828, 106 S. Ct. 90, 88 L. Ed. 2d 74 (1985).

[130] *Id.* at 1342.

[131] *Id.* at 1343.

[132] *Id.* at 1343 (quoting *United States v. Noti*, 731 F.2d 610, 614-15 (9th Cir. 1984)).

the *Miranda* warnings given Appellant by Palm Springs detectives adequately advised him of his constitutional rights. Prior to each of his three interviews with the detectives, Appellant was warned (1) that he had the right to an attorney *and* (2) that he had the right to have that attorney present during questioning. When read with the latter portion of that statement, the first part adequately advised Appellant he had the right to consult with counsel before questioning. Although the actual words "before questioning" were not included in the first part of the statement, the second part which read "and to have him present when you're being questioned" made that point sufficiently clear.[133]

RECORDING OF APPELLANT'S CUSTODIAL STATEMENT AND RCW 9.73.090

(7) Whether Appellant's statements to Palm Springs, California police, which were recorded without his knowledge as permitted by California law, violated Washington's Privacy Act, RCW 9.73, and thus were inadmissible in Washington courts.

Appellant claims his recorded statements should have been suppressed because they violated either or both RCW 9.73.030 and .090(1)(b)(i) and because the Palm Springs, California police officers were agents of the King County Police Department.

[36] Washington's Privacy Act, RCW 9.73, is

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[133] *See State v. Koopman*, 68 Wn. App. 514, 520, 844 P.2d 1024 (1992) (rejecting appellant's claim that her *Miranda* warnings were defective because she had not been explicitly told she had the right to have counsel present *before* and during questioning), *review denied*, 121 Wn.2d 1012 (1993).

designed primarily to protect private persons from public dissemination of illegally obtained information.[134] This Court has concluded that "RCW 9.73.090 is specifically aimed at the specialized activity of police taking recorded statements from arrested persons, as distinguished from the general public."[135] In *State v. Rupe*, this Court again confirmed that "RCW 9.73.090, unlike RCW 9.73.030, applies specifically to individuals who have been arrested."[136] Appellant made his statements to Palm Springs police officers after his arrest. Thus RCW 9.73.090, and not RCW 9.73.030, initially would be applicable in this case.[137] RCW 9.73.090(1) provides in pertinent part:

> (1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center

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[134] *State v. Fjermestad*, 114 W.2d 828, 834, 791 P.2d 897 (1990); *State v. Wanrow*, 88 Wn.2d 221, 233, 559 P.2d 548 (1977).

[135] *State v. Cunningham*, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980).

[136] *State v. Rupe*, 101 Wn.2d 664, 683, 683 P.2d 571 (1984).

[137] RCW 9.73.030(1)(b) provides:

"91) Except as otherwise provided in this chapter, it shall be unlawful for . . . the state of Washington, its agencies, and political subdivisions to intercept, or record any:

". . . .

"(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation . . . without first obtaining the consent of all the persons engaged in the conversation."

personnel in the following instances:

. . . .

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statements so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities.

[37] The Palm Springs police officers recorded Appellant's statements. This is standard practice for Palm Springs police in serious felony cases.[138] But they did not inform Appellant of the recording. It is not disputed that they could record Appellant's statements without his consent under California

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[138] Supplementation of Report of Proceeding, at 2, July 10, 1992.

Law.[139] But if this were done in Washington, it most probably would be in violation of RCW 9.73.090(1)(b). Our concern then becomes whether evidence lawfully obtained by police authorities in California should be suppressed in a criminal case in Washington State if similar action by Washington authorities would be in violation of Washington law.

Appellant claims *State v. Gwinner*,[140] *State v. Mollica*[141] and *State v. Johnson*[142] support the argument that his recorded statements to California police should have been suppressed. Those cases addressed a question similar to this one, that is, whether evidence lawfully obtained by federal agents under federal law is admissible in Washington criminal proceedings when similar action by state authorities would violate the Washington Constitution. Those cases are at least pertinent to the issue in this case.

In *Gwinner*, the Court of Appeals, Division One, adopted the principle that evidence independently obtained by federal officers in compliance with federal law, but in violation of state constitutional guaranties, is admissible in Washington state criminal proceedings.[143] In that case a Washington detective telephoned a federal

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[139] *See* CAL. PENAL CODE §§ 632, 633 and 633.5 (West Supp. 1992).

[140] *State v. Gwinner*, 59 Wn. App. 119, 796 P.2d 728 (1990), *review denied*, 117 Wn.2d 1004 (1991).

[141] *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315 (1989).

[142] *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994), *review denied*, 126 Wn.2d 1004 (1995).

[143] *Gwinner*, 59 Wn. App. at 120.

officer with information on the defendant, who was suspected of carrying drugs. Federal officers arrested the defendant as he was walking to his automobile. They also conducted a warrantless search of his vehicle, permissible under federal law but impermissible under Washington Constitution article I, § 7. The search yielded cocaine, the evidence defendant sought to suppress. In determining the evidence was admissible, the court in *Gwinner* looked to *State v. Mollica*,[144] a New Jersey case which addressed the same question.

The court in *Mollica* traced the history of the "silver platter" doctrine, which developed when federal standards for searches and seizures were more protective than many state standards.[145] Because of the different standards, federal courts adopted the principle that any evidence independently obtained by state officials could be given to federal officials on a "silver platter."[146] The court concluded that under federalism principles, state constitutions do not dictate federal action,[147] and no legitimate state interests would be furthered by forbidding transfer of criminal evidence from federal to state authorities when the evidence was

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[144] *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315 (1989).

[145] *Gwinner*, 59 Wn. App. at 124 (citing *Mollica*, 554 A.2d at 1324-26).

[146] *Id.* (citing *Mollica*, 554 A.2d at 1324). However, the Supreme Court rejected the silver platter doctrine in 1960. *Elkins v. United States*, 364 U.S. 206, 223, 80 S. Ct. 1437, 1447, 4 L. Ed. 2d 1669 (1960).

[147] *Gwinner*, 59 Wn. App. at 125 (citing *Mollica*, 554 A.2d at 1327).

lawfully obtained by the former.[148] Employing the "silver platter" doctrine, the court thus determined such evidence need not be suppressed if the federal officers acted without the assistance or cooperation of the state officers.[149]

The "key element of the silver platter doctrine requires that the officers of the federal jurisdiction not act as agents of the forum state jurisdiction nor under color of state law."[150] To determine whether the federal authorities are acting in such a manner, the courts consider, among other things:

> [A]ntecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law. On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency.[151]

The court in *Gwinner* found the contact between the Washington detective and the federal agents to be a mere "transfer of information by telephone."[152] There was no evidence that the detective requested the federal officers to search the defendant's car or that the detective knew

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[148] *Id.* (citing *Mollica*, 554 A.2d at 1327-29).

[149] *Id.* (citing *Mollica*, 554 A.2d at 1329-30).

[150] *Id.* at 125.

[151] *Id.* (quoting *Mollica*, 554 A.2d at 1329) (alteration in original).

[152] *Id.*

beforehand they would do it. The court held no agency relationship existed between the federal officers and the state. Thus the conduct of the federal officers was not under color of state law and the evidence was not suppressed.

In *Johnson*, the Court of Appeals, Division Two, reached a different conclusion than *Gwinner* on the same question because the federal authorities did not independently obtain the evidence at issue. In *Johnson*, state and federal officers worked together in investigating and arresting the defendants, a Washington couple. The court found numerous contacts between the state and federal authorities: (1) a Washington detective went with federal officers to investigate the defendants' property; (2) the detective helped federal officers very information; (3) state authorities took pictures of the defendants' property at the request of federal authorities and gave the photographs to them; (4) both state and federal authorities executed the warrant to search defendants' property; (5) evidence seized from the defendants' property was turned over to the state; and (6) the husband was turned over to the state of Washington after his arrest. The court concluded the federal authorities acted with the "cooperation and assistance" of state authorities and this conduct triggered state constitutional protection.[153]

The reasoning of *Gwinner*, *Mollica* and *Johnson* leads to the preliminary conclusion that whether Appellant's recorded confessions should be suppressed depends upon the answer to the question whether the Palm Springs police were "agents" of

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[153] *Johnson*, 75 Wn. App. at 700 (quoting *Gwinner*, 59 Wn. App. at 125).

this state, as defined under those cases, or whether the Palm Springs police merely acted with the "cooperation and assistance" of King County police, as interpreted in *Johnson*.

The Palm Springs police arrested Appellant and questioned him concerning events surrounding the injuries to Ms. Susan J. Schnell in California. During the initial interview, Appellant asked the officers to tell the King County police to come and talk with him. He articulately and unhesitatingly described in great detail the events surrounding Ms. Holly C. Washa's death and told them her body would be found in the trunk of a 1985 Oldsmobile parked in space 266 at the Budget Parking lot next to Shumsky's Restaurant near the Seattle-Tacoma Airport. After the interview, the officers contacted the King County Police and told them about the information Appellant had given. After locating the 1985 Oldsmobile as Appellant directed and finding Ms. Washa's body in the trunk, the King County police contacted the Palm Springs Police Department and asked them to get a statement from Appellant. The Palm Springs police told Appellant about the King County police request and asked if he was willing to give a statement. Appellant explained what he would say and then told them "Okay, you can let them know that I'm willing to cooperate up there . . . ."[154]

The State correctly points out that the facts here are more similar to *Gwinner* than to *Johnson*. In *Gwinner*, the Washington state detective merely contact the federal officers with information about the defendant. The detective did not ask them to

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[154] Ex. 89, tape 2, side 1.

search the defendant's automobile and did not know beforehand they would conduct the search. In this case, the State simply telephoned Palms Springs police and asked them to get a statement from Appellant. The King County police did not tell the Palm Springs police what to ask or how to conduct the interview. Nor did they know the Palm Springs police would record Appellant's statements.

Appellant contends the Palm Springs police were "cooperating and assisting" King County police by questioning him about the Washington incidents. But the pertinent question is whether King County police cooperated with and helped Palm Springs police so extensively that the latter did not "independently" obtain Appellant's statements. When compared to *Johnson*, the facts here do not support a conclusion that King County police were "cooperating [with] and assisting" the Palm Springs police. The King county police merely telephoned Palm Springs police and asked them to question Appellant. Unlike in *Johnson*, in this case there was no collaborative effort between the two police departments in obtaining statements from Appellant.

Appellant's argument that his recorded statements should have been suppressed under *Gwinner*, *Johnson* and *Mollica* is thus not convincing.[155] The Palm Springs police lawfully and

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[155] The trial court found an agency relationship was created when the State asked the Palm Springs police to question Appellant further. However, the court concluded that the King County police did not know the statements would be recorded; no evidence suggested King County police were trying to violate Washington law; and the Palm Springs police were following California law. Thus, suppressing the tapes would

independently recorded the statements under California law. Those statements were therefore admissible at trial, even though similar action in Washington might have been in violation of RCW 9.73.090(1)(b).

Appellant does not identify any state interest to be advanced by suppressing the recorded statements. No Washington state officer violated RCW 9.73 and no one's privacy interests protected by the statute were infringed. As suggested by the State, suppression of the statements would serve only to keep highly probative and lawfully obtained evidence from the jury.

The State asks this court to adopt and affirm the reasoning of *State v. Mayes*[156] in resolving the question whether evidence lawfully obtained in another state should be admissible in Washington state, even if similar action by officers in this state would violate Washington law. In *Mayes* the Court of Appeals, Division Two, concluded the Privacy Act, RCW 9.73, did not apply to evidence obtained by police officers of another state within that state and according to its laws. *Mayes* acknowledged that "Washington has no criminal jurisdiction over actions having no effect in this state."[157] In *State v. Williams* this court noted the *Mayes* decision was based upon the doctrine that "a state legislature's enactment of a privacy statute creates a privacy expectation only for individuals who are within the b

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not further Washington's interest. Report of Proceedings, vol. 4-B, at 53-55 (Sept. 15, 1992).

[156] *State v. Mayes*, 20 Wn. App. 184, 579 P.2d 999, *review denied*, 91 Wn.2d 1001 (1978).

[157] *Id.* at 193.

orders of that state."[158] Other jurisdictions have reached the same conclusion.[159] However, the court noted in *Williams* it had not yet addressed the validity of that doctrine.[160]

This Court in *In re Teddington* declared the *Gwinner* decision "correctly" held that evidence "independently and lawfully obtained by federal officers acting pursuant to federal law may be transferred to state authorities for use in a Washington State criminal proceeding."[161] We agree with the conclusion reached in *Mayes* and rule that RCW 9.73 does not apply to Appellant's statements taken by Palm Springs police and lawfully recorded without his knowledge or consent.

SUFFICIENCY OF THE RECORD FOR APPELLATE REVIEW

(8) Whether there is before this court a record of "sufficient completeness" for adequate appellate review of the issues presented in Appellant's appeal.

Appellant argues there is not a record of sufficient completeness for adequate review of his

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[158] *State v. Williams*, 94 Wn.2d 531, 540 N.1, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980) (citing *Mayes*, 20 Wn. App. at 193).

[159] *Williams*, 94 Wn.2d at 540, n.1 (citing *Commonwealth v. Bennett*, 245 Pa. Super. 457, 369 A.2d 493 (1976)).

[160] *In re Personal Restraint of Teddington*, 116 Wn.2d 761, 772-73, 808 P.2d 156 (1991). *See also State v. Bradley*, 105 Wn.2d 898, 902-03, 719 P.2d 546 (1986) ("Neither state law nor the state constitution can control federal officers' conduct.").

[161] *Id.*

conviction and sentence of death and that therefore he is entitled to a new trial. He takes issue with the absence of a portion of the CrR 3.5 pretrial hearing verbatim report of proceedings involving the July 10, 1992 testimony of one of the Palm Springs detectives who interrogated him. He concludes that because this portion of the record (which addresses his *Miranda* warnings) is missing, appellate counsel is unable to effectively assign and argue error on appeal, denying him the right to effective assistance of counsel and due process. He also concludes that the missing transcript prevents this court from properly considering his arguments on appeal relating to his *Miranda* warnings, ER 404(b) evidence, and RCW 9.73. This claim is without merit.

Due Process requires that a record of "sufficient completeness" be provided for appellate review of the errors raised by a criminal defendant.[162] RCW 10.95.100 provides that a death sentence must be reviewed by this court "on the record." RAP 9.1(a) provides that the "record on review" may consist of (1) a report of proceedings, (2) clerks papers, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings. RAP 9.1(b) provides that "the report of proceedings may take the form of a 'verbatim report of proceedings' . . ., a 'narrative report of proceedings' . . ., or an 'agreed report of proceedings'. . . ." And RAP 9.3 authorizes

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[162] *See Draper v. Washington*, 372 U.S. 487, 496-98, 9 L. Ed. 2d 899, 83 S. Ct. 774, 779-80, *cert. denied*, 374 U.S. 850 *and* 374 U.S. 852 (1963). *See also State v. Larson*, 62 Wn.2d 64, 66-67, 381 P.2d 120 (1963). ("Under the rule of the *Draper* case, we must have a '*record of sufficient completeness*' for a review of the errors raised by the defendant in a criminal case.")

use of a narrative report of proceedings if the court reporter's notes are lost.

[38] There is no verbatim report of proceedings for the portion of the CrR 3.5 pretrial hearing held on July 10, 1992 because the court reporter was unable to find the notes for that day. As a result, this court directed the trial court to "settle all issues regarding the completion of the record for review" in this case. The trial court accordingly prepared from its notes taken at the July 10, 1992 hearing a Supplementation of Report of Proceeding. This provided a record of sufficient completeness for adequate review of the issues raised by Appellant.

The trial court's Supplementation of Report of Proceedings, based upon contemporaneous notes taken by the court on July 10, 1992, constitutes a narrative report of proceedings for that portion of the hearing sufficient to make the record complete. Appellant's assertion that the trial court's narrative report is "conclusory at best" on the issue of *Miranda* warnings is rebutted by the fact that, along with the trial court's narrative report, the record on review also contains the tape recordings of Appellant's statements to the Palm Springs Police which included *Miranda* warnings,[163] as well as the trial court's oral ruling on the issues of *Miranda* warnings and RCW 9.73.[164] Additionally, there are verbatim reports of all other proceedings, including the

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[163] See Ex. 89 The extensive verbatim record of proceedings consists of more than 50 volumes. The Clerk's Papers number more than 1700. The trial court admitted 93 exhibits.

[164] Report of Proceedings at 2-12, Sept. 15, 1993.

testimony of Ms. Schnell, Ms. West and Ms. Gray. We reject Appellant's claim that the record is not sufficiently complete for review of the issues in this case.

DEATH QUALIFICATION OF JURORS

(9) Whether the trial court erred in allowing prospective jurors to be "death qualified" during voir dire examination.

The Sixth Amendment to the United States Constitution and WASH. CONST. art. I, § 22 both warrant a defendant "the right to . . . an impartial jury." To ensure an impartial jury in capital cases, prospective jurors opposing the death penalty can be challenged for cause and excluded if their "views would 'prevent or substantially impair the performance of [their] duties as . . . juror[s],'" according to their instructions and their oath.[165] This process is termed "death qualification."[166] In this case, the State "death qualified" the jury during voir dire. The Supreme Court has consistently held that the United States Constitution does not prohibit the states from death qualifying juries in capital cases.[167] However, Appellant claims death qualifying

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[165] *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)); *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995) (quoting *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. at 424)), *cert. denied*, 516 U.S. 1121 (1996).

[166] *See Hughes*, 106 Wn.2d at 180.

[167] *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986); *Wainwright v. Witt*, 469 U.S. 412; *Adams v. Texas*, 448 U.S. 38; *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

a jury violates the Washington Constitution, article I, §§ 21 and 22 because it produces a jury more prone to convict.[168]

[39, 40] Whether the Washington Constitution should be independently analyzed as granting more protection than the federal constitution is determined by examining six nonexclusive factors set forth in *State v. Gunwall.*[169] Those factors are: (1) the textual language of the state constitutional provision at issue; (2) differences in the parallel texts of the federal and state constitutions; (3) state constitutional and common-

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[168] Br. of Appellant at 94-101, 105-12. Although Appellant also contends death qualification disproportionately excludes minorities and women from the jury panel, he does so in general terms and does not claim the jury in this case was disproportionately exclusive of women or minorities. The record does not support that claim. And Appellant presents no evidence showing that death qualification in Washington results in the systematic exclusion of minorities and women from the jury panel.

[169] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517, (1986). In *State v. Hughes,* 106 Wn.2d 176 this Court concluded that death qualifying a jury was permissible not only under the federal constitution, but under the state constitution as well. Some cases have relied upon *Hughes* to reach the same conclusion. *See State v. Gentry,* 125 Wn.2d 570, 634, 888 P.2d 1105, *cert. denied,* 516 U.S. 843 (1995); *State v. Kron,* 63 Wn. .App. 688, 695, 821 P.2d 1248, *review denied,* 119 Wn.2d 1004 (1992); *State v. Peerson,* 62 Wn. App. 755, 779, 816 P.2d 43 (1991), *review denied,* 118 Wn.2d 1012 (1992). But *Hughes* did not analyze the six factors in *State v. Gunwall* to conclude that death qualification is allowed under the Washington Constitution. Thus, in determining whether death qualification violates the Washington Constitution, *Hughes* and the cases following do not control at this point. *See State v. Irizarry,* 111 Wn.2d 591, 595-97, 763 P.2d 432 (1988) (Utter, J., concurring).

law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern.[170] This Court will address a state constitutional claim only if the claimant sufficiently briefs the *Gunwall* factors.[171] Appellant has satisfied that requirement.

Gunwall Analysis

The first *Gunwall* factor requires this Court to examine the text of the state constitutional provisions at issue. provides that "[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record. . . . " Const. art. I, § 22 (amend. 10) provides that "[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury. . . ." CONST. art. I, § 21 emphasizes the importance of the right to trial by jury, by declaring the right "shall remain inviolate." Nothing in the state constitutional provisions suggests that death qualifying a jury is prohibited.

The second *Gunwall* factor requires this Court to consider significant differences between the texts of parallel provisions of the federal and state constitutions. The Sixth Amendment and CONST. art. I, § 21, are similar in that both grant the "right

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[170] *Gunwall*, 106 Wn.2d at 61-62.

[171] *State v. Wethered*, 110 Wn.2d 466, 472-73, 755 P.2d 797 (1988); *State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993). *See also State v. Brett*, 126 Wn.2d 136, 159, 892 P.2d 29 (1995) (declining to discuss the defendant's right to an impartial jury under CONST. art. I, § 22 because the *Gunwall* factors were not analyzed), *cert. denied*, 516 U.S. 1121 (1996).

to . . . an impartial jury." But CONST. art. I, § 21, which declares "[t]he right of trial by jury shall remain inviolate. . . ." has no federal counterpart. This Court in *Pasco v. Mace*[172] found that difference between the state and federal constitutions significant enough to hold that the right to a jury trial under the state constitution, unlike the federal constitution, extended to the case of any adult criminal offense, including petty offenses. But *Pasco* did not address death qualification and is of little relevance to this case.[173]

Under the third *Gunwall* factor this Court must look to common law and constitutional history. Appellant relies on *Pasco v. Mace*,[174] *State v. Lane*[175] and *State v. Stegall*[176] to argue that case law supports the proposition that the right to a jury trial under the state constitution is broader than under the federal constitution. Appellant's reliance on those cases in this context is misplaced. The Court in *Pasco* held the state constitutional right to a jury trial extended to all cases of adult criminal offenses, including petty offenses. In *Lane* the Court

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[172] *State v. Wethered*, 110 Wn.2d 466, 472-73, 755 P.2d 797 (1988); *State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993). *See also State v. Brett*, 126 Wn.2d 136, 159, 892 P.2d 29 (1995) (declining to discuss the defendant's right to an impartial jury under CONST. rat. I, § 22 because the *Gunwall* factors were not analyzed), *cert. denied*, 516 U.S. 1121 (1996).

[173] *City of Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982).

[174] *City of Pasco v. Mace*, 98 Wn.2d 87.

[175] *State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952).

[176] *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d 979 (1994).

determined an accused can waive his right to trial by a jury of twelve "and submit his cause to eleven jurors," as the defendants did in that case.[177] *Stegall* recognizes the right to a 12-person jury and sets forth requirements for a valid waiver of that right.[178] Neither of these cases addresses the constitutionality of death qualification under the state constitution.

Appellant further asserts that *Pasco, Lane* and *Stegall* evidence this state's intent to expand federal constitutional protections relating to jury questions. Appellant's assertion has little merit. In *State v. Schaaf*[179] this Court applied the *Gunwall* analysis and held that the state constitution gives no greater right to a jury trial for juveniles than does the federal constitution. Additionally, the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right and particularly in the context of death qualification.[180]

Under the fourth *Gunwall* factor we look for guidance to preexisting law, or law existing prior to adoption of the Washington Constitution.[181] At the time CONST. art. I, §§ 21 and 22 were adopted, CODE OF 1881 § 1083, at 202, provided:

> No person whose opinions are such as to preclude him from finding any defendant

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[177] *Lane*, 40 Wn.2d at 737.

[178] *Stegall*, 124 Wn.2d at 729.

[179] *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987).

[180] *See* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 510-11 (Beverly Paulik Rosenow ed., 1962).

[181] *Gunwall*, 106 Wn.2d at 61-62.

> guilty of an offense punishable with death, shall be compelled or allowed to serve as a juror on the trial of any indictment for such an offense.

As that passage indicates, preexisting law supports the process of death qualification. And, as the State points out, no preexisting body of state law supports a broader interpretation of CONST. art. I, §§ 21 and 22 in this context.

The fifth *Gunwall* factor requires this Court to examine the structural differences between the federal constitution and the state constitution. That factor always favors independent state constitutional analysis "because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power."[182]

Under the sixth *Gunwall* factor this Court examines whether the matter at issue is of particular state interest or local concern. In *Taylor v. Louisiana,* the United States Supreme Court stated:

> The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.[183]

The Supreme Court has also emphasized there is not "any one right way for a State to set up its capital

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[182] *Gunwall*, 106 Wn.2d at 61-62.

[183] *State v. Gocken*, 127 Wn.2d 95, 105, 896 P.2d 1267 (1995) (citing *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994)).

sentencing scheme."[184] Those statements suggest the death qualification process is a matter of purely local state concern. Even though that may be true, this court has shown no inclination to provide broader protection of defendants' constitutional rights in the context of death qualification.[185]

[41, 42] Applying the *Gunwall* factors leads us to conclude there is no basis for Appellant's argument that Const. art. I, §§ 21 and 22 should be independently analyzed as affording broader protection in the context of death qualification than the Sixth Amendment. Washington's common law, statutory history and constitutional history do not support Appellant's claim that death qualifying a jury violates the Washington Constitution article I, §§ 21 and 22.[186] Previous capital cases, including *State v. Hughes*[187] and *State v.* Mak,[188] in which a

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[184] *Morgan v. Illinois*, 504 U.S. 719, 725-26, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (quoting *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)).

[185] *E.g.*, *Hughes*, 106 Wn.2d 176; 181; *Gentry*, 125 Wn.2d 570, 634.

[186] Appellant urges this Court to adopt several dissenting opinions of cases from New Jersey and Utah, including *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 250-57 (1987), *cert. denied*, 508 U.S. 947 (1993); *State v. Bey*, 112 N.J. 123, 548 A.2d 887, 900 (1988); *State v. Marshall*, 123 N.J. 1, 586 A.2d 85, 129-34 (1991) and *State v. Young*, 853 P.2d 327, 342-43 (Utah 1993), from which Appellant cites extensively to support his claim that death qualification violates the Washington Constitution. The *Gunwall* analysis contradicts his claim. Although informative, those dissenting opinions do not affect our independent state constitutional analysis.

[187] *State v. Hughes*, 106 Wn.2d 176.

Gunwall analysis was not conducted, properly upheld death qualification as valid under the Washington Constitution.

[43, 44] Appellant argues death qualification produces a conviction-prone jury in violation of his right to an impartial jury. But that argument overlooks the fact that the State also has a right to an impartial jury.[189] This Court acknowledged in *Hughes* that the voir dire process is aimed at excluding persons who cannot be fair to both sides of the case:

> The guarantee of impartiality cannot mean that the state has a right to present its case to the jury *most* likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury *most* likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury *least* likely to convict or impose the death penalty, nor that the defense must present its case to the jury *least* likely to find him innocent or vote for life imprisonment.
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> . . . .
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> The logical converse of the proposition that death-qualified jurors are conviction prone is that non-death-qualified jurors are

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[188] *State v. Mak*, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986), *sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett*, 754 F. Supp. 1490 (W.D. Wash. 1991), *aff'd*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993).

[189] *Hughes*, 106 Wn.2d at 185 (citing *Hayes v. Missouri*, 120 U.S. 68, 70-71, 7 S. Ct. 350, 30 L. Ed. 578 (1887)).

acquittal prone, not that they are neutral.[190]

In *Hughes* this Court declined "to define 'impartial' as 'a middle ground that involves a jury with persons who are in effect defendant prone.'"[191] Impartiality of jury members is presumed when they are selected from a fair cross-section of the community and they can properly follow their oath to apply the law to the facts of the case "regardless of the mix of individual view points actually represented" by the jurors.[192]

Appellant also refers to studies reviewed in the United States Court of Appeals for the Eighth Circuit in *Grigsby v. Mabry*[193] to support his claim that death qualified juries are more prone to convict. But in *Hughes* this Court considered and rejected a similar claim by defendant which relied on the studies in *Grigsby*.[194]

Statutory Basis

Appellant asserts death qualification is unconstitutional because it has no statutory basis after former RCW 10.49.050[195] was repealed in 1981.

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[190] *Id.* at 185-86 (quoting *Smith v. Balkcom*, 660 F.2d 573, 579 (5th Cir. 1981), *modified on other grounds*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982)) (first alteration and emphasis in original).

[191] *Id.* at 186 (quoting *Smith*, 660 F.2d at 579).

[192] *Id.* at 186 (quoting *Lockhart v. McCree*, 476 U.S. at 184).

[193] *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986).

[194] *Hughes*, 106 Wn.2d at 182-84. *Hughes* also rejects Appellant's suggestion that separate juries should be required for the guilt and penalty phase. *Id.* at 186-88.

[195] Former RCW 1049.050 provided:

He relies chiefly upon *Witherspoon v. Illinois*[196] to support his assertion. He also contends no court rules authorize the death qualification process.

[45] The State argues RCW 4.44.170(2) and CrR 6.4(c) provide sufficient basis for death qualification. RCW 4.44.170(2) provides for challenging a juror for cause for actual bias:

> For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

Although the statute does not specifically refer to death qualification, it does support that process. CrR 6.4(c)(2) provides that "RCW 4.44.150 through RCW 4.44.200 shall govern challenges for cause." Those provisions include RCW 4.44.170(2). In addition, our cases have consistently upheld the process of death qualification even without a statute which specifically refers to it.[197]

Appellant's reliance upon *Witherspoon* is misplaced. Although the Supreme Court in that case evaluated an Illinois statute requiring death

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"No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be compelled or allowed to serves as a juror on the trial of any indictment or information for such an offense."

[196] *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

[197] *E.g., Gentry*, 125 Wn.2d at 634; *Mak*, 105 Wn.2d at 707; *Hughes*, 106 Wn.2d at 180-88.

qualification, the case does not stand for the proposition that a specific statute is required to permit death qualification by the State. As Appellant acknowledges, the Supreme Court has stated there is not "any one right way for a State to set up its capital sentencing scheme."[198] The State points to the more recent Supreme Court decision of *Wainwright v. Witt*[199] in which the Court reviewed a trial court decision granting a challenge for cause in a capital case. The Court did not examine a death qualification statute, but found the trial court properly excused a juror for cause because of her views on the death penalty.[200]

RCW 4.44.170(2), CrR 6.4(c)(2) and our case law provide sufficient authority for death qualifying a jury. We reject Petitioner's argument that because there is no statutory authority for it, death qualification of jurors is unconstitutional.

Trial Court Exclusion of Jurors Challenged For Cause

(10) Whether certain prospective jurors were properly excused for cause.

Appellant claims the trial court abused its discretion in excusing prospective jurors Ms. Lisa Denis, Ms. Kristin A. Henderson and Richard Deal upon challenges for cause by the State.

[46, 47] A trial court's ruling on challenge of a prospective juror for cause is reviewed for manifest

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[198] *Spaziano v. Florida*, 468 U.S. at 464.

[199] *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

[200] *Witt*, 469 U.S. at 430.

abuse of discretion.[201] This Court gives deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially.[202] This is because "[t]he trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial."[203] In *Wainwright v. Witt* the Supreme Court quoted from *Reynolds v. United States* that "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. . . ."[204]

[48] The standard for ruling on challenges for cause in a death penalty case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror according to instructions and the oath taken by jurors.[205]

Voir Dire of Ms. Lisa Denis

When questioned on voir dire about whether she had ever made a life or death decision, Ms. Lisa

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[201] *Brett*, 126 Wn.2d at 158; *Gentry*, 125 Wn.2d at 634 (citing *State v. Rupe*, 108 Wn.2d 734, 759, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988)); *Mak*, 105 Wn.2d at 707.

[202] *Gentry*, 125 Wn.2d at 634 (citing *Wainwright*, 469 U.S. at 425-26; *In re Lord*, 123 Wn.2d 296, 309, 868 P.2d 835 (1994)).

[203] *Brett*, 126 Wn.2d at 158 (citing *Rupe*, 108 Wn2d at 749).

[204] *Witt*, 469 U.S. at 428 n.9 (quoting *Reynolds v. United States*, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1878)).

[205] *Brett*, 126 Wn.2d at 157; *Gentry*, 125 Wn.2d at 635; *Wainwright*, 469 U.S. at 424.

Denis answered "No. I don't know . . . I don't know if I could vote, I don't know if I could."[206] She also indicated the death penalty "would be a very difficult position" for her.[207] Defense counsel asked her "[D]o you think that you could follow [the judge's] instructions to consider the possibility of a death penalty as a sentence?" She answered "Oh, yeah, I could follow the instructions. I think that-actually making that decision, no."[208] The court asked Ms. Denis if, given her knowledge, background and opinion, she could actually vote to impose the death penalty. Ms. Denis replied "I don't think I could. It would have to be so crystal clear. It would just have to be-[.]"[209]

The trial court did not abuse its discretion in excusing Ms. Denis for cause. The record supports the court's finding that her views about the death penalty would have substantially impaired her ability to follow the court's instructions.

Voir Dire of Ms. Kristin A. Henderson

On voir dire, Ms. Kristin A. Henderson agreed she could follow the court's instructions and make a decision under the law. But she also voiced strong feelings against the death penalty. She said she felt the death penalty made "brutes of us all" and was "barbaric."[210] The court asked if she would seriously be willing to consider both the alternatives of life

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[206] Report of Proceedings at 79, Nov. 4, 1993.

[207] Report of Proceedings at 79, Nov. 4, 1993.

[208] Report of Proceedings at 84, Nov. 4, 1993.

[209] Report of Proceedings at 93, Nov. 4, 1993.

[210] Report of Proceedings at 95, Nov. 3, 1993.

without possibility of parole and the death penalty, given her strong feelings. She replied "It would be difficult. I mean, I can see myself, I guess I could express it in body language perhaps. Pardon me. I would be sitting there like this."[211]

The trial court did not abuse its discretion in excusing Ms. Henderson for cause because her oral responses and body language showed she would be substantially impaired in performing her duties as a juror.

Voir Dire of Richard Deal

Appellant did not object at trial to the State's challenge of Richard Deal for cause. At any rate, Mr. Deal was properly excused. On voir dire he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing Mr. Deal for cause.

Jury Instructions on Premeditation and Intent

(11) Whether the terms "premeditation" and "intent" were sufficiently explained in the trial court's instructions to the jury.

Appellant contends the trial court committed reversible error by not instructing the jury that premeditation and intent are separate elements of aggravated first degree murder. He assigns error to

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[211] Report of Proceedings at 101, Nov. 3, 1993. Ms. Henderson crossed her arms, held her hand up and sat back.

the court giving Instruction 11 defining premeditation:

> Premeditation means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.[212]

Instruction 11 is Washington Pattern Instruction (Criminal) (WPIC) 26.01, which we have upheld in other capital cases.[213] Appellant objected to Instruction 11 at trial and argues the trial court should instead have given his proposed Instruction 7 which read:

> Intent and premeditation are not synonymous. Premeditation cannot simply be inferred from the existence of a criminal intent.
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> Premeditation involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. Although no specific period of time is required, sufficient time must have elapsed to allow deliberate formation of

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[212] Clerk's Papers at 1423.

[213] *State v. Rice*, 110 Wn.2d 577, 603, 757 P.2d 89 (1988), *cert. denied*, 491 U.S. 910 (1989); *State v. Benn*, 120 Wn.2d 631, 657-58, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

> the intent to act and reflection upon the act intended. Premeditation necessarily involves an appreciable length of time.[214]

[49-52] Errors in instructions are reviewed de novo.[215] Jury instructions are to be read as a whole and each instruction is read in the context of all others given.[216] "[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case."[217] The court need not give a party's proposed instruction if it is repetitious or collateral to instructions already given.[218]

[53] A review of the instructions given in this case satisfies us the trial court did not err. In addition to Instruction 11, the court defined "intent" in Instruction 26, WPIC 10.01, which reads: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime."[219] Instruction 26 is almost identical to RCW 9A.08.010(1)(a).[220] The court also gave Instruction 10:

> To convict the defendant of the crime of first-degree premeditated murder, each of the following elements of the crime must be proved beyond a reasonable doubt:

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[214] Clerk's Papers at 1175.

[215] *Brett*, 126 Wn.2d at 171.

[216] *Id.*; *Gentry*, 125 Wn.2d at 603.

[217] *Rice*, 110 Wn.2d at 603.

[218] *Benn*, 120 Wn.2d at 655.

[219] Clerk's Papers at 1438.

[220] RCW 9A.08.010(1)(a)

> (1) That on or about the 24th day of May, 1991, the defendant caused the death of Holly Washa;
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> (2) That the defendant acted with intent to cause the death of Holly Washa;
>
> (3) That the intent to cause the death was premeditated; and
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> (4) That the acts occurred in King County, Washington.
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> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

A reading of Instructions 10, 11 and 26 indicates the court instructed the jury that "premeditation" and "intent" were separate elements of aggravated first degree murder.[221] The instructions adequately follow the law in defining premeditation and intent. The trial court thus was not required to give Appellant's proposed Instruction 7. The court did not commit reversible error in giving Instruction 11 and refusing to give Appellant's proposed Instruction

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[221] RCW 9A.32.030(1)(a) provides:

"**Murder in the first degree**. (1) A person is guilty of murder in the first degree when:

"(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person. . . ."

7.

AGGRAVATING FACTORS

(12) Whether the trial court properly instructed the jury concerning the aggravating factors in the case.

Insufficiency of Evidence

The State charged Appellant with aggravated first degree murder by committing first degree murder in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree, rape in the first or second degree, and kidnapping in the first degree.[222]

Appellant contends there was not sufficient evidence to prove he killed Ms. Holly C. Washa during, in the course of, in furtherance of, or in immediate flight from the crimes of robbery, rape, or kidnapping. He thus claims he was denied due process when the trial court denied his motion to dismiss the aggravated murder charge, in which he claimed there was insufficient evidence of the aggravating circumstances of rape and robbery at the close of the State's case in the guilt phase.

[54] In challenges to the sufficiency of evidence to prove an aggravating factor in

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[222] Clerk's Papers at 1. Under RCW 9A.32.030(1)(a), a person is guilty of murder in the first degree, when, with premeditated intent to cause the death of another person, the accused causes the death of that person or of a third person. RCW 10.95.020(9) provides that a person is guilty of aggravated first degree murder by committing first degree murder "in the court of, in the furtherance of, or in immediate flight from . . . (a) Robbery in the first or second degree; (b) Rape in the first or second degree . . . 9d) Kidnapping the first degree[.]"

aggravated murder, this Court must view the evidence most favorably towards the nonmoving party to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt.[223]

[55] To establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an "intimate connection" between the killing and the felony.[224] The killing must be part of the "res gestae " of the felony, that is, in "close proximity in terms of time and distance." A "causal connection" must clearly be established between the two.[226] In other words, "more than a mere coincidence of time and place is necessary."[227]

The trial court in this case relied primarily upon *State v. Leech*[228] and *State v. Dudrey*[229] in denying Appellant's motion to dismiss the aggravated murder charge. This Court in *Leech* declined to apply a literal reading of "in furtherance of." In that case, a fire fighter died while fighting a fire set by the defendant. The defendant, charged with felony murder, argued his act of arson ended

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[223] *Brett*, 126 Wn.2d at 166.

[224] *State v. Golladay*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970), *overruled on other grounds, State v. Arndt*, 87 Wn.2d 374, 378, 553 P.2d 1328 (1976).

[226] *Golladay*, 78 Wn.2d at 130.

[227] 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5, at 225 (1986) (discussing "casual connection" necessary between felony and murder in felony murder cases).

[228] *Leech*, 114 Wn.2d 700.

[229] *Dudrey*, 30 Wn. App. 447.

once he set the fire and that any death caused by the fire was not within the res gestae or "in furtherance of" that crime. But we concluded that because the fire fighter died while the arson fire was still engaged, his death was sufficiently close in time and place to the arson to be within the res gestae of that felony.

The Court of Appeals, Division Three, in *Dudrey*, another felony murder case, concluded the killing was part of the res gestae of the felony where a burglary and a killing were closely related and occurred at about the same time and place. The defendant and a friend planned to burglarize the victim's home, where they knew she was sleeping. She awoke when the defendant threw a rock through the window. As she investigated, she was killed by either the defendant or his friend. The court found there was an "intimate and close connection" between the homicide and the burglary.[230]

But in *State v. Golladay*[231] this Court found no intimate connection between a homicide and a larceny allegedly committed by the defendant. The defendant claimed he gave the victim and her male companion a ride in his automobile. He stated he then dropped them off. Later, while still driving, he accidentally hit an embankment. Witnesses at the accident scene saw him dispose of the victim's purse and shoes. The victim was later found dead. We determined the larceny was separate, distinct, and independent from the homicide. We concluded there was no "legal relation" between the killing and the larceny, pointing to the fact the larceny occurred

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[230] *Id.* at 450.

[231] *Id.*

after the killing[232] and that the killing was not within the res gestae of the larceny.[233]

Neither *Leech*, *Dudrey* nor *Golladay* completely addresses the specific issue raised by Appellant. He argues the killing of Ms. Washa was not in furtherance of either the rape or robbery because the killing occurred "hours" after those crimes were committed or completed, and thus the killing would not be within the res gestae of those crimes, or the killing was not committed to "further" those crimes. In *Leech, Dudrey* and *Golladay,* the killings and related felonies occurred within close proximity of time and place. In the circumstances presented by this case, the felonies occurred sometime within a two-day period, presumably "hours" before the actual killing.

Although Appellant claims his killing of Ms. Washa did not "further" the rape, robbery or kidnapping, following *Leech* we will not apply too literal an interpretation of "in furtherance of," but will look instead to whether the killing was part of the res gestae of the felony. We have also recognized the need for a "causal" or "intimate" connection between a killing and a related felony to establish the killing was committed in the course of, in furtherance of, or in immediate flight from the felony.

The record in this case supports our conclusion that Appellant's killing of Ms. Holly C. Washa was within the res gestae or had a "causal connection" to the rape, robbery and kidnapping. The crimes are

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[232] *Golladay*, 78 Wn.2d at 131.

[233] *Id.*

linked by Appellant's motive to obtain money to pay for his California trip. He made plans to meet Ms. Susan J. Schnell in Palm Springs, California and admitted to California police that he kidnapped Ms. Washa because he needed money to go there. He held Ms. Washa captive after robbing her. He told the Palm Springs police he had thought about robbing someone and letting that person go but "it would be just the same as waltzing into a bank and have my picture taken." He held Ms. Washa captive for two days and raped and tortured her during that time. He admitted killing her because he did not want to leave a witness alive. Immediately after killing Ms. Washa, Appellant went to California. The killing and other felonies are intimately connected. From the beginning of Appellant's criminal acts against Ms. Washa, he was not separated from her until he killed her and left for California.

Viewing the record in the light most favorable to the State leads us to conclude there was sufficient evidence from which any rational trier of fact could have found beyond a reasonable doubt that the murder in this case was committed in furtherance of, in the course of, or in immediate flight from rape, robbery and kidnapping.[234] The trial court did not err in denying Appellant's motion to dismiss his aggravated murder charge. Appellant was not

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[234] Appellant conceded at trial the kidnapping was a continuing course of conduct and the killing was committed "in immediate flight from" the kidnapping. The record shows he kept Ms. Washa captive until her death. Thus, the kidnapping did not terminate until Appellant killed her and immediately left for California. The killing was committed "in the course of" and "in immediate flight from" the kidnapping.

denied due process.

Jury Instructions

Appellant asserts the trial court committed reversible error and denied him due process by not instructing the jury on "in the course of," "in furtherance of," and "in immediate flight" as elements of the aggravating factors, as he proposed at trial. Appellant also complains the trial court erred in not giving that proposed instruction when, on December 9, 1993, the jury during deliberations asked in writing "Do we have a (legal) definition of in Furterance off [sic] and or Imidiate [sic] flight."[235] The court refused the defense request for the proposed instruction and told the jury, after affording all counsel an opportunity to consider it, "You have all of your instructions in this area. No further instructions will be given."[236]

[56, 57] Considering the jury's request, Appellant complains the phrases "in the course of," "in furtherance of," "in flight from," and "immediate flight" are technical terms in the context of this case and the court should have instructed the jury concerning them. A term is "technical" when it has a meaning that differs from common usage.[237] The phrases here are not defined by statute. No appellate court has defined them and no pattern jury instructions address them. We conclude the phrases are expressions of common understanding to be given meaning from their common usage.

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[235] Clerk's Papers at 1410.

[236] *Id.*

[237] *See State v. Scott*, 110 Wn.2d 682, 694, 757 P.2d 492 (1988) (Utter, J., dissenting).

[58] Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory.[238] For example, upon request, the trial court must give instructions on the statutory meaning of "intent."[239] But jury instructions need not define terms such as "common scheme or plan,"[240] "single act,"[241] "leniency,"[242] or "mitigating circumstances."[243]

This Court has recognized that "[t]rial courts should exercise sound discretion to determine the appropriateness of acceding to requests that words of common understanding be specifically defined."[244] And when a jury has begun deliberating, the trial court also has discretion to determine whether to give further instructions upon request.[245] The trial court in this case properly exercised its discretion by not giving Appellant's proposed instructions defining the phrases "in the course of," "in furtherance of," or "in immediate flight from" a felony.

[59] Appellant also claims the court's refusal to define those phrases violated his due process

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[238] *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); *Scott*, 110 Wn.2d at 689.

[239] *Allen*, 101 Wn.2d at 361-62.

[240] *Benn*, 120 Wn.2d at 673-74; *State v. Jeffries*, 105 Wn.2d 398, 420, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986).

[241] *Benn*, 120 Wn.2d at 674.

[242] *Id.*

[243] *State v. Bartholomew*, 101 Wn.2d 631, 647, 683 P.2d 1079 (1984).

[244] *Scott*, 110 Wn.2d at 692 (citation omitted).

[245] *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988).

rights because they were "essential elements of the aggravators." And he argues jury instructions omitting essential elements of the crime prevent an accused from arguing its theory of defense and requires reversal. Even assuming those phrases are essential elements of the crimes charged, this Court has recognized that failure to give a definitional instruction is not failure to instruct on an essential element.[246] The record in this case shows the trial court instructed the jury on all essential elements of the crimes charged.[247] The defense was not prevented from arguing its theory of the case. Appellant's claim is without merit.

The trial court did not commit reversible error or violate Appellant's due process rights by not giving instructions defining "in the course of," "in furtherance of," or "in immediate flight from" a felony.

Penalty Phase Instructions

(13) Whether the trial court erred during the penalty phase in refusing to give the jury certain instructions proposed by the defense.

Appellant claims the trial court erred by not giving several of his proposed penalty phase instructions to the jury.[248] To support his claim, he argues Washington is a "weighing state" and his proposed instructions were necessary to

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[246] *Scott*, 110 Wn.2d at 690.

[247] *See* Clerk's Papers at 1411-41 ("Court's Instructions to the Jury").

[248] See Appellant's proposed instructions P-9A, P-9B, P-11, P12, P-13, P-17, P-21, P-22 and P-23.

appropriately channel the jury's discretion during sentencing. And, he asserts, without his proposed instructions, the jury's decision was "an illusion of rational decisionmaking" in violation of the 8th and 9th Amendments to the United States Constitution and Washington Constitution, article I, section 14.

Weighing and Non-weighing Death Penalty Statutes

The United States Supreme Court has classified state death penalty statutes as either "non-weighing" or "weighing."[249] The terms refer to the process in a death penalty case in which the sentencer considers or weighs a variety of factors in deciding whether to impose the death penalty.[250]

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[249] *Compare Zant v. Stephens*, 462 U.S. 862, 873-80, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (reviewing Georgia's "non-weighing" death penalty statute) *with Stringer v. Black*, 503 U.S. 222, 229-35, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) (concluding Mississippi has a "weighing" death penalty statute).

[250] In *Williams v. Calderon*, 52 F.3d 1465, 1478 n.11-13 (9th Cir.1995), *cert. denied*, 516 U.S. 1124 (1996), the United States Court of Appeals for the Ninth Circuit noted states with weighing or non-weighing death penalty statutes, according to state and federal court decisions.

The following states were identified or treated as having "non-weighing" death penalty statutes: **Georgia**, *Zant v. Stephens*, 462 U.S. 862 (1983) (GA. CODER ANN. § 17-10-30 (Michie 1994)); **Illinois**, *People v. Todd*, 154 Ill. 2d 57, 607 N.E.2d 1189, 1197-98 (1992) (ILL. COMP. STAT. § 5/9-1 (1992)), *cert. denied*, 510 U.S. 944, 114 S. Ct. 381, 126 L. Ed. 2d 331 (1993); **Kentucky**, *Wilson v. Commonwealth*, 836 S.W.2d 872, 891 (Ky.1992) (KY. REV. STAT. ANN. § 532.025 (Michie 1994)), *cert. denied*, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993); **Louisiana**, *Ward v. Whitley*, 21 F.3d 1355, 1365 (5th Cir. 1994) (LA. CODE. CRIM. PROC. ANN. art. 905.3-.4 (West 1994)), *cert. denied*, 513 U.S. 1192, 115 S. Ct. 1257, 131 L. Ed. 2d 137 (1995); **Virginia**, *Briley v. Bass*, 742 F.2d 155, 166 (4th Cir.) (VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4

(Michie 1994)), *cert. denied,* 469 U.S. 893, 105 S. Ct. 270, 83 L. Ed. 2d 206 (1984); **Delaware**, *Bailey v. Snyder,* 855 F. Supp. 1392, 1408-10 (D. Del.1993) (DEL. CODE ANN. tit. 11, § 4209 (1994)) aff'd, 68 F.3d 736 (3rd Cir.1995), *cert. denied,* 516 U.S. 1088 (1996) and **Missouri**, *State v. LaRette,* 648 S.W.2d 96, 102 (Mo.), (MO. ANN. STAT. §§ 565.030, 565.032 (Vernon 1994)). *cert. denied,* 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

The following states were identified or treated as having "weighing" death penalty statutes: **Alabama**, *Lawhorn v. State,* 581 So.2d 1159, 1176 (Ala. Crim. App.1990) (ALA. CODE §§ 13A-5-46 to -49 (1994)), *aff'd, Ex parte Lawhorn,* 581 So.2d 1179 (Ala.1991) *cert. denied,* 502 U.S. 970 (1991); **Arizona**, *Richmond v. Lewis,* 506 U.S. 40, 45-49, 113 S. Ct. 528, 534-35, 121 L. Ed. 2d 411 (1992) (ARIZ. REV. STAT. ANN. § 13-703 (1994)); **Arkansas**, *Ford v. Lockhart,* 861 F. Supp. 1447, 1453 (E.D. Ark. 1994) (ARK. CODE ANN. §§ 5-4-602 to -604 (Michie 1994)); **Colorado**, *People v. White,* 870 P.2d 424, 447-49 (Colo.) (COLO. REV. STAT. § 16-11-103 (1994)), *cert. denied,* 513 U.S. 841, 115 S. Ct. 127, 130 L. Ed. 2d 71 (1994); **Florida**, *Parker v. Dugger,* 498 U.S. 308, 318, 111 S. Ct. 731, 737-38, 112 L. Ed. 2d 812 (1991) (FLA. STAT. ANN. § 921.141 (West 1995)); **Indiana**, *Bellmore v. State,* 602 N.E.2d 111, 129-30 (Ind.1992) (IND. CODE ANN. § 35-50-2-9 (Michie 1994)); **Mississippi**, *Stringer v. Black,* 503 U.S. 222, 229-30, 112 S. Ct. 1130, 1136, 117 L. Ed. 2d 367 (1992) (MISS. CODE ANN. § 99-19-101 (1993)); **Nebraska**, *State v. Reeves,* 239 Neb. 419, 476 N.W.2d 829, 836 (1991) (NEB. REV. STAT. §§ 29-2522 to 29-2523 (1993)), *cert. denied,* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992); **Nevada**, *Canape v. State,* 109 Nev. 864, 859 P.2d 1023, 1031-35 (1993) (NEV. REV. STAT. §§ 200.030, 200.033 (1993)), *cert denied,* 513 U.S. 862, 115 S. Ct. 176, 130 L. Ed. 2d 112 (1994); **New Mexico**, *State v. Henderson,* 109 N.M. 655, 789 P.2d 603, 609-10 (1990) (N.M. STAT. ANN. §§ 31-20A-2, 31-20A-5 (Michie 1995)); **North Carolina**, *Smith v. Dixon,* 14 F.3d 956, 974 (4th Cir.) (en banc) (N.C. GEN. STAT. § 15A-2000 (1994)), *cert. denied,* 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994); **Ohio**, *State v. Davis,* 38 Ohio St.3d 361, 528 N.E.2d 925, 933 n.11 (1988) (OHIO REV. CODE ANN. §§ 2929.03-.04 (Anderson 1993)), *cert. denied,* 488 U.S. 1034, 109 S. Ct. 849, 102 L. Ed. 2d 980 (1989); **Oklahoma**, *Stafford v.*

In weighing states, such as Arizona or Mississippi, aggravating factors are weighed against mitigating evidence. The death penalty may be imposed only where specified aggravating factors outweigh all mitigating evidence.[251] For example, under Arizona's statute, the sentencer is required to evaluate both mitigating and aggravating circumstances and impose the death penalty if it finds one or more aggravating circumstances specified in the statute and finds no sufficiently substantial mitigating circumstances in favor of leniency.[252] The Supreme Court read it as requiring the sentencer to weigh both circumstances to determine the relative "substan[ce]" of the two.[253]

Saffle, 34 F.3d 1557, 1568 (10th Cir.1994) (OKLA. STAT. ANN. §§ 701.10-.12 (West 1995)) *cert. denied* 514 U.S. 1099, 115 S. Ct. 1830, 131 L. Ed. 2d 751 (1995); **Pennsylvania**, *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833, 849-51 & n.16 (1985) (42 PA. CONS. STAT. ANN. § 9711 (1994)), *cert. denied*, 475 U.S. 1150, 106 S. Ct. 1804, 90 L. Ed. 2d 349 (1986); **Tennessee**, *State v. Howell*, 868 S.W.2d 238, 259-62 (Tenn.1993) (TENN. CODE ANN. § 39-13-204 (1994)), *cert. denied*, 510 U.S. 1215, 114 S. Ct. 1339, 127 L. Ed. 2d 687 (1994); **Utah**, *State v. Archuleta*, 850 P.2d 1232, 1247-48 (Utah) (UTAH CODE ANN. §§ 76-3-207, 76-5-202 (1994), as interpreted by *State v. Pierre*, 572 P.2d 1338, 1347-48 (Utah 1977)), *cert. denied*, 510 U.S. 979, 114 S. Ct. 476, 126 L. Ed. 2d 427 (1993); **Wyoming**, *Zant v. Stephens*, 462 U.S. 862, 874 n.12, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (WYO. STAT.ANN. § 6-2-102 (Michie 1988)), as interpreted by *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), *cert. denied*, 455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 463 (1982).

[251] *E.g., Parker v. Dugger*, 498 U>S. 308, 318, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

[252] *Richmond v. Lewis*, 506 U.S. 40, 47, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992).

[253] *Id.*

In weighing states, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if the other aggravating factors are valid.[254] This conclusion arises from the assumption that the weighing process has been "skewed." An invalid aggravating factor creates the possibility the sentencer may be biased in favor of the death penalty, based upon an illusory circumstance.[255] And "a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."[256] Thus, an aggravating factor should give principled guidance to the sentencer to assure that determining whether a human life should be taken is not a product of "unbridled discretion."

[60] In contrast, in a non-weighing state, like Georgia, the fact finder considers all the circumstances from both the guilt phase and penalty phase in deciding the penalty.[257] These circumstances relate to both the crime and the defendant. In Georgia, for example, the jury must find at least one aggravating factor before imposing a death sentence, but the aggravating factors do not have a specific function in the jury's decision whether to impose the death penalty. The fact finder or sentencer is not required to weigh mitigating factors against aggravating factors.[258]

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[254] *Id.* at 46.

[255] *Stringer*, 503 U.S. at 236.

[256] *Stringer*, 503 U.S. at 232.

[257] *Id.* at 230 (discussing Georgia death penalty statute).

[258] *Id.* at 233 (discussing Louisiana death penalty statute).

Appellant urges us to determine Washington is a "weighing" state. But Washington's death penalty statute actually aligns this state with "non-weighing" states. At sentencing, the jury must answer only the statutory question "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"[259] The statute does not require the jury to weigh specified aggravating factors against mitigating factors. And, as in other non-weighing states, a jury in Washington considers not only the crime proved, but all the evidence presented in both the guilt and penalty phases.[260]

Appellant concedes this Court has not previously analyzed Washington's death penalty statute under the United States Supreme Court's weighing or non-weighing classification. By citing Washington cases which employ the words "weigh" or "weighs" or "outweighed," he attempts to convince this Court to implicitly recognize RCW 10.95 *et seq.*, as a "weighing" statute. We are not convinced.

In *Williams v. Calderon*[261] the United States Court of Appeals for the Ninth Circuit reasoned that:

> [T]he Supreme Court's weighing/non-weighing distinction may involve both

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[259] RCW 10.95.060(4).

[260] RCW 10.95.060; RCW 10.95.070. *See State v. Jeffries*, 105 Wn.2d 398; *State v. Mak*, 105 Wn.2d 692.

[261] *Williams v. Calderon*, 52 F.3d 1465, 1477-78 (9th Cir. 1995) (footnotes omitted), *cert. denied*, 516 U.S. 1124 (1996).

> procedural and substantive components. Procedurally, is the sentencer restricted to a "weighing" of aggravation against mitigation? Substantively, is the sentencer prevented from considering evidence in aggravation other than discrete, statutorily-defined factors? Our review of federal and state court decisions reveals that where both constraints are present, the regimes involved are uniformly treated as weighing; where neither is present, the regimes are uniformly treated as non-weighing. . . .

Applying the *Williams* approach to our death penalty statute supports our conclusion that RCW 10.95 *et seq.* is a "non-weighing" statute.[262] Under the statute, the jury is not restricted to weighing aggravating factors against mitigating factors, but may consider all evidence presented during both the guilt and penalty phases. The jury may also consider non-statutory aggravating factors.[263]

Penalty Phase Instructions

Appellant argues the trial court erred by not giving his proposed instructions P-9A, P-9B, 11, 12, 13, 17, 21, 22, and 23 during the penalty phase. He

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[262] In *Campbell v. Blodgett*, 978 F.2d 1502, 1512-13 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit determined that nothing in RCW 10.95 suggests the jury is required to engage in a balancing test, or impose the death penalty after finding the factors "in balance."

[263] *E.g.*, *State v. Gentry*, 125 Wn.2d 570 (victim impact evidence); *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (adult convictions and juvenile court adjudications of guilty); *Delo v. Lashley*, 507 U.S. 272, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993) (unadjudicated criminal conduct).

claims his proposed instructions were necessary to meet the constitutional requirement that the discretion of the jury be adequately focused by clear and objective standards.

[61-63] An instruction must correctly state applicable law.[264] The trial court does not err in refusing to give an instruction when, evaluated in the context of all the instructions, it is collateral to or repetitious of those already given.[265] A jury is presumed to follow instructions given.[266] Jury instructions are sufficient if they correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case.[267]

[64] Claimed errors at the penalty phase of a capital case are reviewed under heightened scrutiny. This requires an appellate court to review the record more carefully, but does not entail a different standard of review.[268]

[65] Appellant's proposed Instructions P-9A and P-9B sought to remind the jury of the limited purpose for which certain evidence had been admitted, including Ms. Brieanna C. West's testimony, Ms. Jan M. Gray's testimony, and the events in California. As Appellant acknowledged in those proposed instructions, the court had already given those instructions to the jury in the guilt

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[264] *Benn*, 120 Wn.2d at 654.

[265] *Id.* at 655.

[266] *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1992).

[267] *Benn*, 120 Wn.2d at 654-55.

[268] *Brett*, 126 Wn.2d at 182.

phase.[269] The trial court did not err in refusing to give Appellant's proposed instructions P-9A and 9-9B again in the penalty phase.

In Appellant's proposed Instruction P-11, he identified as the "crime" the jury was to have in mind the elements of premeditated first degree murder and the aggravating circumstances found by the jury in the guilt phase. It further instructed the jury "You must not consider any other feature of the crime that is not necessarily reflected in the elements and aggravating circumstances." That is a misstatement of the law.

[66] Under RCW 10.95.070, the jury may consider other factors at the beginning of the special sentencing process, including [2] whether the murder was committed while the defendant was under the influence of extreme mental disturbance; [3] whether the victim consented to the act of murder; [5] whether the defendant acted under duress or domination of another person; and [8] whether there is a likelihood the defendant will pose a danger to others in the future. It is not unconstitutional for the jury to consider the circumstances of the crime for which Appellant was convicted.[270] Thus, the trial court did not err in refusing to give Appellant's proposed Instruction P-11.

Appellant's proposed Instruction P-12 states that the phrase "having in mind the crime of which the defendant has been found guilty" was "intended

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[269] Clerk's Papers at 1419-20 (Instruction 7 and Instruction 8).

[270] *See Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

merely to provide a context for [the jury's] determination" of the death penalty. That misstates the law and is misleading. Under RCW 10.95.060(4) in answering the question on leniency, the jury is required to "hav[e] in mind the crime of which the defendant has been found guilty. . . . " The jury may thus consider all the evidence submitted in the guilt phase proving the crime the defendant committed. It is not correct to state the question is merely a context for the jury's consideration.

Proposed Instruction P-12 also stated the jury must "not weigh the crime, any of its elements, any aspect of it or any circumstance surrounding it against the mitigating evidence" and that its "sole focus" should be whether there were insufficient mitigating circumstances to merit leniency. However, under non-weighing statutes, such as Washington's RCW 10.95, "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."[271] The jury was correctly instructed by the court to consider all the evidence from both the guilt and penalty phases, and not just whether there were insufficient mitigating circumstances.

Appellant's proposed Instruction P-13 states "The number and nature of the aggravating factors found by you in the first phase of these proceedings should have no effect on your decision regarding the question posed by these instructions." This instruction is misleading and confusing. The jury was required to "have in mind" the crimes committed by Appellant, which included the aggravating factors found during the guilt phase. The trial court also

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[271] *Tuilaepa*, 114 S. Ct. at 2638.

instructed the jury it was to consider the evidence submitted during both the guilt phase and penalty phase, which include the aggravating factors. The trial court did not err in refusing to give a proposed instruction which was misleading and contradicted instructions already given.

Four of Appellant's proposed instructions would advise the jury not to consider certain factors as "weighing" against any mitigating evidence presented. Those factors include (1) any impression they may have of the crime as heinous, depraved or cruel, or any related emotional response they have which weighs against any mitigating circumstance (P-17); (2) the future dangerousness of Appellant (P-21);[272] (3) the expense of imprisoning Appellant for life (P-22) and (4) the deterrence of others (P-23). However, as the State correctly observes, RCW 10.95 is not a weighing statute. Appellant's proposed instructions incorrectly assumed Washington is a "weighing" state and that the jury would weigh aggravating factors against mitigating factors in its decision.

[67] "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances[.]"[273] The Constitution does not require the jury to ignore other possible aggravating factors to determine who will actually be sentenced to death.[274] "What is important at the

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[272] RCW 10.95.070(8) specifically provides that a jury may consider whether there is a likelihood the defendant will pose a danger to others in the future.

[273] *Zant*, 462 U.S. at 890.

[274] *Stringer*, 503 U.S. at 231.

selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime."[275]

Washington's death penalty statute properly provides for "categorical narrowing" of those eligible for the death penalty in the guilt phase and for individualized determination and appellate review.[276] Under RCW 10.95.020 the jurors consider statutory aggravating circumstances in the guilt phase to select the class of persons eligible for the death penalty. In this case the jurors found aggravating circumstances, among which were that Appellant killed Ms. Holly C. Washa in the course of, in furtherance of, or in immediate flight from the related felonies of rape, robbery and kidnapping.

The jury's determination was based upon evidence admitted at trial. The jury was instructed in the guilt phase not to permit "sympathy or prejudice" to influence their decision.[277] During the penalty phase, the court instructed the jury that the evidence it was to consider consisted of "testimony of the witnesses and the exhibits admitted into evidence in phase one [the guilt phase] of this trial and during this special sentencing hearing."[278] In addition, during the penalty phase, Appellant presented mitigating evidence to the jury. The jury heard evidence of Appellant's traumatic birth and difficult childhood. There was also testimony that Appellant suffered from anti-social personality

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[275] *Zant*, 462 U.S. at 879 (emphasis omitted).

[276] *Id.*

[277] Clerk's Papers at 1413 (Instruction 1).

[278] Clerk's Papers at 1581 (Instruction 1).

disorder, sexual sadism and manic syndrome. The jury was given full opportunity to consider those mitigating factors. Thus, Appellant's argument that the court's refusal to give his proposed instructions resulted in an unconstitutional "illusion of rational decisionmaking" is without merit.

RCW 10.95.130 requires this Court to determine upon review whether the death sentence was arbitrary, excessive, disproportionate, or brought about through passion or prejudice. In answering that inquiry in the negative, we conclude the trial court did not err in refusing to give Appellant's proposed sentencing phase instructions.

Criminal History

Appellant assigns error to the trial court's denial of his motion to exclude his criminal history during the penalty phase. However, our death penalty statute authorizes the jury to consider a defendant's prior criminal history in the penalty phase. RCW 10.95.070(1) states:

> In deciding the question posed by RCW 10.95.060(4), the jury . . .may consider any relevant factors, including but not limited to the following:
>
> (1) Whether the defendant has or does not have a significant history, either as a juvenile or as an adult, of prior criminal activity[.]

[68] During the penalty phase the State presented Appellant's criminal history limited to his record of convictions. This is constitutionally permissible.[279] The trial court did not err in denying

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[279] *E.g., State v. Bartholomew*, 101 Wn.2d at 640-41.

Appellant's motion to exclude his criminal history.

Notice of Special Sentencing Proceeding

(14) Whether Appellant was properly served with the Notice of Special Sentencing Proceeding required by RCW 10.95.040(2).

Appellant argues this Court should set aside his death sentence because there is no proof the State served him or his attorneys with its notice of intent to seek the death penalty. In support of his claim he relies upon RCW 10.95.040(3) and *State v. Dearbone,* 125 Wn.2d 173, 177, 883 P.2d 303 (1994).[280]

RCW 10.95.040 imposes upon the State specific requirements for notifying a defendant it intends to seek the death penalty. When a person is charged with aggravated first degree murder, the State must file a "notice of a special sentencing proceeding" to determine whether the death penalty should be imposed when there is reason to believe there are insufficient mitigating circumstances to merit leniency.[281] The State must file and serve the notice on the defendant or defendant's counsel within 30 days after arraignment unless the court extends or reopens the filing period upon showing of good

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[280] In Appellant's brief, the argument heading for this section states: "THE STATE FAILED TO SERVE ITS NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON MR. BROWN OR HIS ATTORNEYS WITHIN 30 DAYS OF THE ARRAIGNMENT, REQUIRING THIS COURT TO STRIKE THE DEATH SENTENCE IN THIS CASE." Br. of Appellant at 55. However, in the argument section itself, Appellant only claims "there is absolutely no proof" the State served him or his attorneys. *Id.* at 56.

[281] RCW 10.95.040(1).

cause.[282] RCW 10.95.040(3) states that if the notice is not filed and served as provided under RCW 10.95.040, the State "may not request the death penalty."[283]

The record in this case shows the notice of special sentencing proceeding was properly filed on March 24, 1992 within 30 days after Appellant's arraignment on February 26, 1992.[284] But Appellant claims "there is absolutely no proof that the State ever served [him] or his attorneys with this Notice."[285] He notes "[t]here may be a hearing at which the Notice was served, but there is no evidence of which hearing that is in the clerk's papers."[286] RCW 10.95.040 requires the State to serve a defendant with the notice of special sentencing proceeding, but does not require proof of service. Appellant does not claim he was not served with the notice, but only there is no proof he was served. His argument is without merit.

Dearbone cited by Appellant is distinguishable from this case. In that case, the State did not serve defense counsel with the notice of special sentencing proceeding until four days after expiration of the time for service under RCW 10.95.040(2). The defendant moved to preclude the State from requesting the death penalty because of violation of RCW 10.95.040(2). The State then moved to reopen the time for service and served defense counsel

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[282] RCW 10.95.040(2).

[283] RCW 10.95.040(3).

[284] Clerk's Papers at 37.

[285] Br. of Appellant at 56.

[286] Br. of Appellant at 56, n.8.

another copy of the notice. The trial court found good cause for reopening the time for service and granted the State's motion, allowing the State to seek the death penalty. On review, this Court determined the State did not show good cause and reversed the trial court. In its reasoning, this Court stated that "filing and service of notice is mandatory-no notice, no death penalty."[287] In this case, Appellant did not raise the issue of service in the trial court, does not claim the notice was untimely served under RCW 10.95.040(2), and only bases his claim before this court on the fact there is no proof he was served. Appellant does not argue he was not served with the notice. *Dearbone* does not apply.

A review of the record supports a reasonable conclusion Appellant was properly served with the notice of special sentencing proceeding. On March 25, 1992, a day after the notice was filed, Appellant and one of his attorneys appeared before the court and signed an order setting trial date.[288] An omnibus hearing was also held on that date. The record does not show any objections concerning service of the notice. On June 5, 1992 Appellant filed a motion to set aside the notice of special sentencing proceeding to determine whether the death penalty should be imposed.[289] In the motion, Appellant argued the notice should be set aside for violation of RCW 10.95.040(1) because the State had information showing mitigating circumstances sufficient to merit leniency. At that time he made no claim the State

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[287] *State v. Dearbone*, 125 Wn.2d 173, 177, 883 P.2d 303 (1994).

[288] Clerk's Papers at 38, 47-49.

[289] Clerk's Papers at 275.

had not properly served him or his attorney with notice. His attorneys appeared numerous times before the trial court after March 24, 1992, but never raised the issue of service of the notice.

Appellant's claim that his death sentence should be set aside for absence of proof of service of notice under RCW 10.95.040 is without merit.

Reciprocal Discovery

(15) Whether Criminal Rule 4.7 (CrR 4.7) mandates reciprocal pretrial discovery of evidence relevant to the penalty phase in a capital case.

On cross appeal, the State assigns error to the trial court's ruling denying its pretrial motion to compel disclosure of Appellant's penalty phase mitigation evidence. The State argues this court should hold that CrR 4.7 mandates reciprocal pretrial discovery of information pertinent to the penalty phase of a capital case.

On February 12, 1993, the State filed a pretrial motion to compel disclosure of any mitigation evidence in Appellant's possession which he intended to present in the penalty phase of the trial.[290] In response the defense argued, among other things, that forced disclosure of this evidence before completion of the guilt phase of the trial might compromise one or more of Appellant's constitutional rights, such as the right against self incrimination.[291] The trial court denied the State's motion by order dated February 25, 1993, concluding that reciprocal

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[290] Clerk's Papers at 652-64.

[291] *Id.* at 665-80.

discovery of penalty phase evidence was not required before completion of the guilt phase of the trial.[292] The court did, however, order the defense to disclose before trial the identities of any experts it was consulting and planned to call as witnesses at sentencing, but did not allow the State to contact those persons.[293] The court observed that this disclosure would not "constitute waiver of any right to confidentiality or against self-incrimination. . . ."[294]

[69] In general, the scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent a manifest abuse of that discretion.[295] CrR 4.7, a reciprocal discovery rule, guides the trial court in the exercise of its discretion over discovery.[296] The rule applies to all "criminal proceedings."[297] The principle of "full and free" pretrial discovery underlies CrR 4.7 to provide adequate information for informed pleas and to "expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. . . ."[298]

The State does not claim the trial court abused its discretion in making its discovery ruling. It asks

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[292] *Id.* at 686.

[293] *Id.*; Report of Proceedings at 26-34, Feb. 25, 1993.

[294] Clerk's Papers at 686.

[295] *State v. Yates*, 111Wn.2d 793, 797, 765 P.2d 291 (1988) (citing *State v. Mak*, 105 Wn.2d 692).

[296] *Id.*

[297] *See* CrR 1.1.

[298] *Yates*, 111 Wn.2d at 797 (quoting CRIMINAL RULES TASK FORCE, WASHINGTON PROPOSED RULES OF CRIMINAL PROCEDURE 77 (West Publ'g Co. ed. 1971)).

this court to hold that CrR 4.7 provides for reciprocal pretrial discovery of penalty phase evidence in capital trials subject only to the trial court's discretion over the scope of discovery. The State contends the general requirement of reciprocity in criminal discovery applies equally to the guilt and penalty phases of a capital case and, thus, that reciprocal pretrial discovery of penalty phase evidence is required. It cites in support of that contention the California Supreme Court decision of *People v. Mitchell.*[299]

In *Mitchell,* the court was asked to decide whether and to what extent California's general criminal discovery rule, requiring reciprocal pretrial discovery by the parties to a criminal action, was applicable to the penalty phase of a capital case. The rule had been enacted into law in 1990 by initiative and codified in CAL. PENAL CODE, § 1054 (West Supp. 1997). Section 1054.3 of the code requires criminal defendants and their attorneys to disclose to the prosecuting attorney the names and addresses of persons they intend to call "at trial," any relevant statements or reports of those persons, and any real evidence intended to be offered into evidence. The prosecuting attorney has similar obligations under the statute.[300]

The defendant in that case refused to provide the prosecution with any pretrial discovery pertinent to the penalty phase of his trial.[301] He argued, as

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[299] *People v. Mitchell*, 5 CAL. 4th 1229, 859 P.2d 102, 23 Cal. Rptr. 403 (1993).

[300] *Id.* at 1232 (referencing § 1054.1).

[301] *Id.*

Appellant did here,[302] that the discovery rule requiring reciprocity did not apply to the penalty phase of a capital case because the penalty phase was a sentencing hearing and not part of a criminal "trial" within the meaning of the rule.[303] The court rejected that argument and held that the penalty phase of a capital trial "is merely a part of a single, unitary criminal proceeding" and embraced within the concept of a "trial" or "criminal trial."[304]

The court in *Mitchell* found more persuasive the defendant's claim that premature disclosure of his penalty phase evidence might jeopardize his defense at the guilt phase of his trial and potentially violate his privilege against self-incrimination.[305] However, the court reasoned that such concerns could be eliminated by deferring a ruling on the prosecution's penalty phase discovery in appropriate cases pending completion of the guilt phase of the trial.[306] The court reasoned that trial courts possess broad discretion to order a general continuance of a prosecutor's discovery request upon a showing that the continuance is appropriate or necessary to protect a criminal defendant's constitutional rights.[307] A continuance might be based upon such considerations as the probable duration of the guilt phase, the likelihood that a guilty verdict with special circumstances will be returned, and the

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[302] Clerk's Papers at 669-70 n.1.

[303] *Mitchell*, 5 Cal. 4th at 1233.

[304] *Mitchell* at 1233-34.

[305] *Id.* at 1237.

[306] *Id.*

[307] *Id.* at 1238.

potential adverse effect disclosure could have on the guilt phase defense.[308] And where necessary, the court may permit such a showing to be made in camera.[309]

[70] *Mitchell* suggests a similar resolution in this case. Like the California discovery rule in *Mitchell,* CrR 4.7 is a general criminal discovery rule applicable to all "criminal proceedings."[310] In the absence of an express statutory provision to the contrary, it applies to criminal proceedings involving the death penalty as well.[311] The rule applies equally to the penalty phase of a capital case as it does to the guilt phase because the former is neither more nor less than the whole "single, unitary criminal proceeding."[312] Although Appellant argues that the penalty phase is a separate sentencing proceeding to which the discovery rules applicable to "criminal proceedings" do not apply, he has cited no authority for that conclusion.

The State's position on the discovery issue is nothing more than actual practice and is merely a restatement of the law which is not in genuine dispute in this case.

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[308] *Id.*

[309] *Id.*

[310] *See* CrR 1.1.

[311] RCW 10.95 governs criminal proceedings involving the death penalty in this state. RCW 10.95.060, which sets forth the procedure to be followed in the penalty phase of a capital case, does not address the subject of discovery. Nor is that subject addressed elsewhere in the statute. *See generally* RCW 10.95.

[312] *Mitchell,* 5 Cal. 4th at 1233.

Victim Impact Evidence

(16) Whether the trial court erred in refusing to admit victim impact evidence at the penalty phase of the trial.

The State relies upon *State v. Gentry*[313] in asserting the trial court erred in refusing to admit the testimony of Ms. Holly C. Washa's father as victim impact evidence. Our decision in *Gentry* had not been announced at the time of trial in this case.[314]

At the penalty phase, the State, in absence of the jury, made an offer of proof of testimony by John L. Washa concerning his daughter's interests and the impact of her murder upon her family. The trial court ruled the testimony was not admissible "under current law and current interpretation. . . ."[315] In *Gentry,* the trial court admitted a similar statement by the victim's father concerning his murdered daughter and the effect of the murder on her family. We agreed with that court's ruling:

> We . . . conclude that victim impact evidence is admissible in the sentencing phase of capital cases and that trial courts, which

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[313] *Gentry*, 125 Wn.2d 570 (1995).

[314] The State was aware the *Gentry* case was pending at the time. Report of Proceedings at 108, Dec. 15, 1993. In offering Mr. Washa's testimony the State explained: "While we wanted to push hard and ask this Court to allow this evidence in front of the jury, we understand that that would put this Court in a very difficult position, but we would like to preserve the issue and be able to cross-appeal it. So essentially what we're asking this Court to do is make a ruling at this time that we don't like so that we would be able to cross-appeal." *Id.*

[315] Report of Proceedings at 109, Dec. 15, 1993.

> are experienced in balancing the probative against the prejudicial, should exercise their informed discretion in deciding the scope of permissible victim evidence in a given case. In the case before us, there was no error in the admission of the victim's father's statements about his young murdered daughter or about the profound effect of the murder upon her family . . .victim impact evidence may properly include a description of the emotional trauma suffered by the victim's family.[316]

[71] If *Gentry* had been decided before the trial in this case, the trial court could have, in its discretion, admitted the testimony of John L. Washa as victim impact evidence at the penalty phase. But it would not have been error not to admit it. At any rate, the trial court did not commit error in denying victim impact evidence in this case.

SUMMARY AND CONCLUSIONS

(1) There was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency. The sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The sentence of death was not brought about by passion or prejudice. Nor is the defendant mentally retarded.

(2) The proportionality review mandated by RCW 10.95.130(b) is not void for vagueness under either the Eighth or Fourteenth Amendments to the United States Constitution, nor under article I, §§ 3

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[316] *Id.* at 632-33.

and 14 of the Washington Constitution.

(3) None of the statements made by the prosecuting attorneys during either the guilt or penalty phases of the trial constituted prosecutorial misconduct requiring a new trial.

(4) The trial court did not abuse its discretion in admitting the testimony of Ms. Susan J. Schnell. Her testimony did not violate Evidence Rule 404(b), nor did it constitute double jeopardy.

(5) The trial court did not abuse its discretion in admitting the testimony of Ms. Jan M. Gray or Ms. Brieanna C. West. Their testimony merely served to establish the context of the case and was not prejudicial to Appellant.

(6) Appellant was adequately advised of his *Miranda* rights before giving statements to the Palm Springs, California police.

(7) The trial court did not err in admitting Appellant's statements which were recorded by the Palm Springs police without his knowledge or consent. The officers lawfully recorded the statements under California law and were not acting as agents of the King County police at that time. Thus RCW 9.73, Washington's Privacy Act, does not require suppression of that evidence. Suppressing the evidence would not further legitimate state interests and would only suppress highly probative evidence lawfully obtained in California.

(8) There is a record of "sufficient completeness" for adequate appellate review of Appellant's case.

(9) "Death qualification" of jurors does not violate the Washington Constitution, article I, §§ 21

and 22.

(10) The trial court properly exercised its discretion in excusing for cause prospective jurors Ms. Lisa Denis, Ms. Kristin A. Henderson and Richard Deal during voir dire. Their views would have prevented or substantially impaired their ability to follow the court's instructions and abide by their oaths as jurors.

(11) RCW 10.95.040 requires the State to serve a defendant with notice of its intent to seek the death penalty within 30 days of arraignment. The record supports a reasonable conclusion that Appellant was served in fact with the notice. The statute does not require proof of service. Thus, Appellant's claim that his death sentence should be set aside merely because there is no proof of service is without merit.

(12) Viewing the record in the light most favorable to the State, any rational trier of fact could have determined, beyond a reasonable doubt, that Appellant committed first degree murder in the course of, in furtherance of or in immediate**632* flight from robbery, rape and kidnapping. The court's refusal to give instructions defining "in furtherance of," "in the course of," or "in immediate flight from" was within its discretion and did not violate Appellant's due process rights.

(13) The record shows the trial court properly instructed the jury that premeditation and intent were separate elements of aggravated first degree murder.

(14) The trial court properly refused Appellant's proposed instructions P-9A, P-9B, P-11, P-12, P-13, P-17, P-21, P-22 and P-23 at the penalty

phase. P-9A, P-9B, P-11, P-12 and P-13 were misleading, repetitious, or misstatements of the law. The trial court's refusal of P-17, P-21, P-22 and P-23 did not render the jury's sentencing decision a product of irrational decision making. The jury received adequate instructions from the trial court. RCW 10.95 properly provides for "individualized determination" of the death penalty and appellate review to ensure the sentence is not imposed arbitrarily, disproportionately or as a result of passion or prejudice.

(15) CrR 4.7 mandates reciprocal pretrial discovery of evidence relevant to the penalty phase of a capital case.

(16) Our decision in *State v. Gentry* was filed only after the trial in this case. That decision allows victim impact testimony during the penalty phase of a capital case. Even under *Gentry* it would not have been error for the trial court to exercise its discretion not to allow victim impact testimony. The trial court did not err in denying victim impact testimony in this case.

We affirm the conviction and death sentence of Appellant Cal Coburn Brown in the King County Superior Court for the aggravated first degree murder of Ms. Holly C. Washa.

DURHAM, C.J., and DOLLIVER, GUY, JOHNSON and TALMADGE, JJ., concur.

MADSEN, J., (concurring in part, dissenting in part) - I concur with the majority that Cal Brown's conviction should be affirmed. However, I would hold the trial court erred in admitting the testimony of Ms. Schnell, the victim in a criminal encounter with Brown in California. Further, I would hold the

admission of that evidence was reversible error as to the sentencing phase of Defendant's trial. Consequently, although I concur in affirming Brown's conviction, I would remand for resentencing.

I. Guilt Phase

In this case, the trial court permitted the California victim, Ms. Schnell, to testify, over objections by defense counsel, regarding the Defendant's violent behavior toward her during the days following the murder of Ms. Washa. Ms. Schnell testified how Brown restrained her with handcuffs and other devices, sexually assaulted her, forced her to write a check to him for $4,000, threatened her with a knife, and slit her throat.

The trial court ruled that Ms. Schnell's testimony was admissible under two exceptions to Evidence Rule (ER) 404, the res gestae exception and the common scheme or plan exception. The court stated the evidence "was relevant to material issues . . . relating to premeditation, intent, and the four [statutory] aggravating factors" and that the "probative value of the testimony . . . substantially outweighed its prejudicial effect." Majority at 573 (referring to the aggravating factors found by the jury pursuant to RCW 10.95.020). The majority agrees.

In my view, the majority and the trial court were wrong in concluding that under ER 404(b) it was proper to admit Ms. Schnell's testimony during the guilt phase of Brown's trial. First, the Schnell testimony is not res gestae evidence. The trial court erred in admitting her testimony under that legal exception to ER 404. Second, ER 404 requires a trial court to balance the probative value against the

prejudicial effect of evidence of other crimes and bad "acts" committed by the defendant. The trial court here correctly acknowledged the very prejudicial nature of the Schnell testimony. The court failed to recognize, however, that ER 404(b) evidence is generally inadmissible and the burden is on the State to establish that evidence of other offenses is not only relevant but "*necessary to prove an essential ingredient of the crime charged.*" (Emphasis added). *State v. Goebel,* 40 Wn.2d 18, 21, 240 P.2d 251 (1952), *overruled on other grounds by State v. Lough,* 125 Wn.2d 847, 860, 889 P.2d 487 (1995); *State v. Saltarelli,* 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (quoting *Goebel,* 40 Wn.2d at 21); *State v. Brown,* 113 Wn.2d 520, 782 P.2d 1013, 80 A.L.R.4th 989 (1989); *State v. Lane,* 125 Wn.2d 825, 831-32, 889 P.2d 929 (1995) (citing *Saltarelli,* 98 Wn.2d 358 and *Goebel,* 40 Wn.2d 18). Because the need for the testimony to prove an essential ingredient of the crimes charged did not overcome the extreme prejudice of that testimony, the admission of Schnell's testimony was error.

A. Res Gestae

Evidence of other misconduct may be admissible under the res gestae exception "[t]o complete the story of *the crime on trial* by placing it in the context of nearby and nearly contemporaneous happenings." 1 MCCORMICK ON EVIDENCE § 190 at 799 (John W. Strong ed., 4th ed. 1992). *See State v. Tharp,* 96 Wn.2d 591, 594, 637 P.2d 961 (1981) (other misconduct admissible "in order that [the jury] have the entire story of what transpired on that particular evening"). In this case, the crimes against Ms. Washa were completed with her death, well before the Defendant's conduct with Ms. Schnell

occurred. Thus, evidence that Defendant raped and cut Ms. Schnell's throat two or three days after the completion of his crimes "on trial" does not constitute res gestae evidence.

In oral argument before this Court the State conceded the same.

Talmadge, J.: You would not be contending that if common plan or scheme were not part of this case that all the details of the crimes that were committed against Ms. Schnell would be at all relevant in terms of res gestae as an exception?

Ms. Pahmeier: That's true.

. . . .

Madsen, J.: Are you conceding that the evidence of the rape and the slashing of the throat would not be relevant if it were offered only for res gestae purposes?

Ms. Pahmeier: Yes, I would say it was definitely admitted under the ER 404(b) common scheme or plan.

. . . .

Ms. Pahmeier: I'm not sure that the evidence of the incidents that took place then in California when he got there would come in except under the court's. . . .

Alexander, J.: So it comes in under common scheme or plan or it doesn't come in at all?

Ms. Pahmeier: That's correct.

Tape of Oral Argument, side 7: 539-570.

Ms. Schnell's testimony does not meet the definition of res gestae evidence and its admission under that exception was erroneous.

B. Necessity of Evidence

To constitute evidence of a common scheme or plan the prior misconduct must be an integral part of a larger or "overarching" scheme or plan. *State v. Lough,* 125 Wn.2d 847, 889 P.2d 487 (1995). Alternatively, the evidence may demonstrate a commonly used scheme or plan. *See id.* at 854-55. The State argues here that Schnell's evidence was admissible under the common scheme or plan exception because his crimes against Ms. Washa were part of his overarching plan to rape, rob, and assault Ms. Schnell. Assuming that the evidence was part of a common scheme or plan, it should, nevertheless, have been excluded because it was not necessary to prove an essential element of the crime charged.

The State says the Schnell evidence was necessary to rebut Defendant's claim that Ms. Washa's murder was an accident or an act of panic, not premeditated murder, and Defendant's claim that the sexual intercourse with Ms. Washa was consensual.

Initially, I find the State's justification for the Schnell evidence disingenuous, considering Defendant never testified and, in fact, offered no defense at all. Most of the evidence against Defendant came from his confession, which Defendant attempted to keep out of evidence. The confession was offered by the State in its case in chief as substantive evidence. Thus, it is the State's own evidence, contained in the confession, which the State is attempting to discredit with Schnell's testimony. The State should not be allowed to offer confession evidence, over defense objection, and then

claim that ER 404 evidence is necessary to rebut Defendant's claim that he lacked premeditation to murder or that sex was consensual. This is particularly true where Defendant has not testified or offered any evidence regarding premeditation, motive, or intent. *See State v. Lavaris*, 106 Wn.2d 340, 346, 721 P.2d 515 (1986) (State may not call witness for primary purpose of impeaching him with otherwise inadmissible testimony).

More importantly, the State's assertions regarding the need for Schnell's testimony are simply not born out by the evidence. Rather than casting doubt on premeditation, Defendant's confession establishes it. In his confession, Defendant stated:

> I realized if I left her there, she could just bang and clang and crunch and scream and be out very quickly. Otherwise, I would have just left her there and that's when I went to the back of the truck and I . . . killed her.

Ex. 89, tape 2, side 1, at 630-650. Moreover, Defendant's discussion of being panicked was in relation to moving the car *after* he had killed her. "I forgot that trunks have like holes and things like that. So I panicked and left that place and drove around. . . ." Ex. 89, tape 1, side 2 at 50-60. Defendant said he killed Ms. Washa because she was a stranger and it made sense for him to kill her. Ex. 89, tape 1, side 1 at 625-635. Clearly, Ms. Schnell's testimony was not necessary on the issue of premeditation.

Nor was the evidence necessary on the issue of consent. He stated in his confession that during intercourse he noticed she was looking at the door and thinking of escape. In response, Brown stated he

decided "to have a little control . . . make her a little more scared of me." Ex. 89, tape 2, side 1. Further, the physical evidence overwhelmingly proved that intercourse was not consensual. *See* Majority at 556.

Finally, it is difficult to see how Defendant's conduct with Ms. Schnell had any bearing on his premeditation in the Washa murder or the consensual nature of his sexual contact with Ms. Washa. Defendant was not charged with premeditation in the Schnell crime, nor was he charged or convicted of sexual assault on Ms. Schnell.

Considering the overwhelmingly strong case for the State based on the physical evidence and Defendant's confession, it is clear that the real reason the State offered Schnell's testimony was to demonstrate the Defendant's propensity to rape, rob, and slash women's throats. The State candidly stated the "exclusion of Schnell's testimony would not have changed the outcome of this case." Br. of Resp't at 109. The State thus concedes the evidence was not necessary.

> In the present case, the exclusion of Schnell's testimony would not have changed the outcome of this case. The remaining evidence, including Brown's confession, is overwhelming. The heinous acts the defendant committed upon Washa were far more compelling than the streamlined testimony from Schnell concerning what the defendant did to her.

Br. of Resp't at 109.

C. Prejudice

The Schnell evidence also fails the second part of the admissibility test; i.e., the probative value of the evidence must outweigh its prejudicial effect. Even assuming Schnell's testimony was admissible under the common scheme or plan exception to ER 404, her testimony was, at best, cumulative and of marginal probative value. *See DeVore v. United States,* 368 F.2d 396, 398 (9th Cir.1966) (evidence of other bad acts deemed improperly admitted because, in view of the cumulative nature of the evidence, the "prejudice to appellants was not balanced by any substantial gain to the government's case"). More importantly, the Schnell evidence was obviously "dragged in" for its prejudicial effect and the emotional response it would evoke. *Carson v. Fine,* 123 Wn.2d 206, 224-25, 867 P.2d 610 (1994). The prosecution was adding frosting to the cake.

D. Harmless Error

The State's case, including the Defendant's confession and the physical evidence, was overwhelming. Thus, while admission of Schnell's testimony was error, it was harmless as to the guilt phase of this trial. It was not, however, harmless as to the penalty phase.

II. Penalty Phase

Unlike the guilt phase, admission of the Schnell testimony is reversible error as to the penalty phase of this capital case. The majority and the trial court fail to recognize that the balancing of the potentially undue prejudicial effect of Ms. Schnell's testimony against its probative value cannot be limited only to issues relevant to the guilt phase of this trial. A jury in a capital crime trial deliberates on an entirely separate question during

the sentencing phase. Therefore, in deciding whether to admit evidence in the guilt phase of a capital trial, the trial court must weigh the effect of such potentially prejudicial evidence against the probative value in the sentencing phase of the trial. Because any probative value of Ms. Schnell's testimony was far outweighed by its prejudicial impact during the penalty phase, admission of such testimony during the guilt phase of the trial was an abuse of discretion.

The decision to admit evidence of other crimes, wrongs, or acts "lies largely within the sound discretion of the trial court" and "will not be reversed on appeal absent a showing of abuse of discretion." *State v. Laureano,* 101 Wn.2d 745, 764, 682 P.2d 889 (1984). However, a review of the evidentiary decision at issue here is also influenced by the fact that the evidence that was admitted had the potential to affect the imposition of the death penalty, which this Court recognizes "qualitatively differs from all other punishments." *State v. Lord,* 117 Wn.2d 829, 888, 822 P.2d 177 (1991), *cert. denied,* 506 U.S. 856 (1992). Because of this qualitative difference, review of a claimed error associated with the sentencing phase of a capital case must receive a more careful review of the record to assure that "there [is] reliability in the determination that death is the appropriate punishment." *Id. See also Kwan Fai Mak v. Blodgett,* 754 F. Supp. 1490, 1493-94 (W.D. Wash. 1991) ("The Constitution requires the most careful scrutiny of every case in which a person has been sentenced to death."), *aff'd,* 970 F.2d 614 (9th cir. 1992), cert. *denied,* 507 U.S. 951 (1993).

A careful review of the record of this case indicates that the State properly notified the

Defendant of the State's intent to seek the death penalty, and that each member of the jury was questioned at voir dire about his or her views with respect to the death penalty. It is, therefore, beyond debate that the parties, as well as the trial judge, were well aware that a special sentencing proceeding, as provided by RCW 10.95.020-.070, would be required if the jury found Brown guilty as charged of aggravated first degree murder. We must also assume that the trial judge was aware that it "is well settled that all evidence which is admissible in the guilt phase [of a capital case] is also admissible in the penalty phase." *In re Lord,* 123 Wn.2d 296, 322, 868 P.2d 835, *cert. denied,* 513 U.S. 849 (1994) (citing *State v. Bartholomew,* 101 Wn.2d 631, 643, 683 P.2d 1079 (1984) and *State v. Mak,* 105 Wn.2d 692, 720-21, 718 P.2d 407, *cert. denied,* 479 U.S. 995 (1986), *sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett,* 754 F. Supp. 1490 (W.D. Wash 1991), *aff'd,* 970 F.2d 614 (9th Cir. 1992), *cert. denied,* 507 U.S. 951 (1993)).

During the penalty phase, the essential question that the jury must answer is whether it is "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.060(4). In order to assure that the special sentencing proceeding in a capital case comports with "state and federal constitutional standards," the Court has specifically held that the province of the jury in such proceedings "must be *limited* to mitigating evidence . . . and mitigating factors only." *Bartholomew,* 101 Wn.2d at 642 (emphasis added). As we stated in *Bartholomew,* "in most cases the prosecution may open only with the defendant's criminal record and evidence which

would have been admissible at the guilt phase of the trial." *Bartholomew,* 101 Wn.2d at 643. Therefore, the State acted properly in this case when it sought to admit evidence that Brown has a criminal record of prior convictions. However, because the "introduction of a certified copy of the judgment and sentence is the preferred way to introduce a prior conviction when it is admissible," Ms. Schnell's detailed testimony would not have been admissible at the penalty phase unless it would have been admissible at the guilt phase, or offered in specific rebuttal to a mitigating factor raised by the Defendant. *State v. Gentry,* 125 Wn.2d 570, 638, 888 P.2d 1105, *cert. denied,* 516 U.S. 843 (1995). As explained above, the evidence was not admissible during the guilt phase.

Looking to the penalty phase, it is indisputable that Ms. Schnell's testimony is probative on the question of whether leniency is warranted. However, one of the reasons, if not the primary reason, such evidence is probative is because of its highly prejudicial nature. It is precisely for this reason that it is generally a violation of the Defendant's due process rights for the jury to even consider such evidence, unless it is relevant to rebut a mitigating factor that has been first raised by the Defendant. *Lord,* 117 Wn.2d at 890 ("[W]hen the defendant presents evidence of mitigating circumstances, the prosecution is not restricted to the record of convictions. The State is entitled to . . . introduce relevant evidence to rebut defendant's evidence so that the jury receives a balanced and complete picture.") This is why this Court has ruled that although the State may, in the opening of the special sentencing proceeding, provide

the jury with certified copies of judgments and sentences concerning defendant's prior convictions, it may not present additional evidence relating to those crimes unless such evidence relates to mitigating evidence or factors raised by the defendant. *See Bartholomew,* 101 Wn.2d at 642.

With respect to the question of whether leniency is warranted, Ms. Schnell's account of Brown's violent acts constituting sexual assault and rape, offenses Brown *was neither charged with nor convicted of,* posed a significant danger of being unfairly prejudicial. *See, e.g., State v. Bowen,* 48 Wn. App. 187, 738 P.2d 316 (1987); *State v. Ramirez,* 46 Wn. App. 223, 730 P.2d 98 (1986); *State v. Harris,* 36 Wn. App. 746, 677 P.2d 202 (1984) (admission of such evidence was reversed because of prejudicial effect on a jury's deliberation of a defendant's guilt or innocence). The trial court should have considered the potential prejudice in the penalty phase when deciding in the guilt phase whether to admit the evidence.

The Supreme Court of New Jersey expressed similar concerns about the impact of guilt phase evidence on the jury's penalty determination in a capital case. *State v. Erazo,* 126 N.J. 112, 594 A.2d 232 (1991). The court said "[w]hen the same jury hears both phases of such a case, evidence admitted on the guilt phase may sometimes taint the penalty phase. With the stakes so high, the possibility of prejudice on the penalty phase persists as a cause for continuing concern." *Id.* at 242.

Upon properly considering the prejudicial impact of the evidence in the penalty phase, the conclusion is unavoidable that the evidence was so

overwhelmingly prejudicial to the jury's sentencing determination that it should not have been admitted. While admission may have been harmless as to the guilt phase, the same cannot be said when the jury's subjective determination of life or death was at issue.

In sum, the nature of the ER 404(b) evidence in this case was so inflammatory that the trial court's failure to balance the probative value of the evidence against the prejudicial impact as it relates to the penalty phase inquiry constitutes an abuse of discretion, for it cannot be said that there is reliability in the determination that death is the appropriate punishment. *Lord,* 117 Wn.2d at 888. ("Because the death penalty qualitatively differs from all other punishments, there must be reliability in the determination that death is the appropriate punishment.")

To be assured of such reliability, I would remand for a new sentencing proceeding where Ms. Schnell's testimony is not presented to a new jury impaneled to determine Defendant's sentence.

ALEXANDER and SANDERS, JJ., concur with MADSEN, J.

Reconsideration denied September 23, 1997.

FILED

May 20, 1994

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)
Plaintiff,	) No. 91-1-03233-1
v.	) COA 61320-6
CAL COBURN BROWN,	) RP-24
Defendant.	)

BEFORE THE HONORABLE RICARDO S. MARTINEZ

NOVEMBER 3, 1993

KING COUNTY COURTHOUSE

SEATTLE, WASHINGTON

APPEARANCES

ALFRED W. MATHEWS, Deputy Prosecuting Attorney, appearing on behalf of the Plaintiff.

THERESA FRICKE, Deputy Prosecuting Attorney, appearing on behalf of the Plaintiff.

LIN-MARIE HUPP, Attorney at Law, appearing on behalf of the Defendant.

TERRY L. MULLIGAN, Attorney at law, appearing on behalf of the Defendant.

KERN W. CLEVEN, Attorney at law, appearing on behalf of the Defendant.

THE COURT: That's fine, Mr. Deal. Good afternoon.

MR. DEAL: Good afternoon.

THE COURT: Do you have any questions at all about any of the preliminary instructions that you got this afternoon and the format that we were talking about or the reasons why the attorneys have to discuss the penalty phase when there may never really be a penalty phase.

MR. DEAL: No, I think I understand the situation.

THE COURT: Did you answer or nod your head about remembering something about having heard this crime before?

MR. DEAL: No, I did not.

THE COURT: Okay. We'll start with the defense.

MS. HUPP: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Good afternoon. My name is Lin-Marie Hupp, and I'm one of Cal Brown's attorneys.

I would like to start off asking you some questions about your feelings about the death penalty. I want to reinforce what the Judge has already told you, which is there are no right or wrong answers. We just need to get information about your feelings so we can do our job.

A Okay.

Q Can you tell me when it was you first realized this was a potential death penalty case?

A Not until last Monday when I was here in the initial jury information session.

Q Okay. Can you tell me when the Judge read that long thing to you and basically told you that this was a potential in the case, can you tell me what you were thinking when you heard that?

A I guess I wasn't surprised when I got the announcement for jury duty. And it was more than the standard two weeks that most everybody else goes to. I thought it must be a pretty substantial case. In my mind I tried to guess what it might e, so this is one of the things that entered into it.

Q Can you give me an idea of what your general feelings about the death penalty are?

A I do believe in the death penalty in severe situations. A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

Q And that case you're talking about, that is the one where he actually came out, the defendants actually came out and

said that he actually wanted to die?

A I believe that was the case.

Q Does that have any kind of bearing on your idea that the death penalty was appropriate in his case?

A I believe that it was in that case.

Q If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?

A It would have to be a severe case. I guess I can't put a real line where that might be, but there are a lot of cases that I don't think it's where people would - -

Q Okay. And let me kind of fill in the blanks for myself here by just asking you a couple of questions about that. I'm assuming that there would not be any case other than murder that you would think the death penalty would be appropriate?

A I think that is correct.

Q Okay. And the way the law is in Washington anyway, in order to get to the point where you would even consider the death penalty, the State would first have to prove that you had committed a premeditate murder and one that had been thought about beforehand.

Do you have any kind of feeling that

something other than a premeditated murder, in other words, one that would have been planned that would be appropriate for the death penalty?

A No. I think it would have to be premeditated.

Q In addition to that in Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that it was done in order to conceal a witness or eliminate a witness.

Does that fall within the class of cases that you think the death penalty is appropriate?

A I think that would be.

Q Okay. Now, how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?

A I think that if a person is temporarily insane or things of that that lead a person to do things that they would not normally do, I think that would enter

into it.

Q All right. Other than - - well, maybe what we should do - - the way that the law is in Washington, if the jury finds beyond a reasonable doubt that somebody has committed a premeditated murder with at least one aggravating circumstance, and in this case you have a potential for the four, then the jury reconvenes to consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed.

One sort of aside here, life without parole is exactly what is sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.

A I understand.

Q Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A I did not until this afternoon.

Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable

doubt.

Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.

Q Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going

to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

Q Okay. That's very fair. Do you have any kind of feelings about the frequency of the use of the death penalty in the United States today? Do you think it's used too frequently or not often enough?

A It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.

Q It sounds like you're a little more comfortable that it is being used some of the time?

A Yes.

Q You weren't happy with the time when it wasn't being used at all?

A I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

Q Let me ask you, and we may have

covered this already, but let me ask you just to make sure I understand. If the State were to prove beyond a reasonable doubt that the defendant had committed a premeditated murder with aggravating circumstances that I have laid out for you, rape, robbery, kidnapping, to conceal or eliminate a witness, at least one of those, in addition another thing you might hear in this trial is some evidence that the defendant deliberately inflicted pain upon the victim before she died for some period of time.

If that was the crime that you heard about and came to a decision about guilty about, do you think you consider a life sentence?

A I could consider it but I don't know if I really have enough information to make a determination.

Q Right. And it's real tough to be asking you these questions and even tougher for you to have to answer them without any evidence before you. But you understand that this is our only time to do that before you have heard all the evidence?

A I understand, yes.

Q As a matter of fact, the law in this state after, even after you have found somebody guilty of really hideous crime like that presumes that the sentence, the appropriate sentence is life without

parole. The State has the burden of proof, again, in the penalty phase. And they would have to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit a life sentence.

Are you comfortable with that idea that you start off presuming that, as a matter of fact, even for a hideous crime that a life sentence is the appropriate sentence?

A It is or is not?

Q That it is an appropriate sentence.

A I guess I'm a little confused by the question. So, you go into it with a life sentence is the appropriate sentence?

Q Right. If you look at the chart here, there's almost a mirror image to start off a trial presuming that somebody is innocent and you start off a sentencing presuming that a life sentence is appropriate?

A I see.

Q Okay.

A Yes.

Q Okay. Now, as far as mitigating circumstances, you had mentioned the idea that maybe somebody was temporarily insane. The Judge is going to give you an instruction on mitigating circumstances, and I will defines it for you, but the definition is real broad.

The definition basically is, any reason, not a justification, not an excuse for the crime and not a defense to the crime, but a reason for imposing something other than death. That's pretty broad.

MR. MATTHEWS: I object to that question. I don't believe that is a question. I believe that's a statement.

THE COURT: The objection will be sustained.

Q (BY MS. HUPP) The judge will instruct you about what a mitigating circumstance is.

But what I want to be real clear about is that it's not a defense to the crime. Okay. In other words, if you believe that somebody was really temporarily insane at the time he committed the offense, well, then it wouldn't be premeditated. It would be an insanity defense, and that would all get dealt with - -

MR. MATTHEWS: Your Honor, again, I am going to object to the nature of the question.

THE COURT: Mr. Deal, you were the one that actually brought it up in terms of the mental status of the person. You are the one who said temporarily insane when they committed this kind of crime. You realize that there are particular defenses that may be available in the

actual criminal case itself, the guilt phase.

But once you get to the penalty phase, we're not taking about the crime in any way, and you're simply trying to determine what the appropriate punishment or sanction should be for a crime that a person has been found guilty of. At that point in time, something like all sorts of mitigating circumstances come into it, and mental status can come into it. But it would only be evaluated in the light of the mitigating circumstances, not a defense. Do you understand that?

A Understand.

Q (BY MS. HUPP) To just sort of follow up on that, if mental status came into play and you were presented with some sort of evidence about mental status, is that the sort of evidence you would consider?

A Yes, I could.

Q How about things like somebody's childhood or their emotional development?

A I could consider it. I don't have strong feelings one way or the other.

Q Okay. All right. And, also, when we talk about mitigating circumstances, what might be mitigating to you might not matter much to the person sitting next to you in juror's box. Do you think

you could discuss your feelings about those things?

A Yes.

Q Could you, say the person next to you says something is mitigating and you don't think it's very mitigating at all, could you also discuss it in this situation?

A (Nodding head).

Q Could you respect that other person's opinion?

A Everybody is entitled to an opinion, yes.

Q Another thing that happens at the sentencing phase of the trial is that the jury would have to be unanimous, in other words, everybody would have to agree if they were going to impose a death sentence. If one person, four people, five people, how ever many people don't agree with that, then the sentence is life. Okay. So, it kind of strips away that sort of comfort in numbers that some people get from the idea of having a unanimous decision.

Do you think you can accept the responsibility for such an important decision for yourself?

A I do.

Q Okay. Thank you.

MS. HUPP: I have no further questions.

THE COURT: The State.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Mr. Deal, I'm Al Matthews. I'm one of two prosecutors in the case. I have got some very specific questions, and perhaps we can clear them up real rapidly.

I see your step-brother is a policeman and you see him about four times a year.

A (Nodding head).

Q Do you ever have any discussion about the death penalty, is this a subject that ever comes up?

A No.

Q Have you ever had occasion to discuss it at all within the family circle?

A I don't believe so.

Q You mentioned on your questionnaire, and we do read them, that you're in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again. Do you remember making that statement?

A Yes.

Q First of all, have you ever been on a jury trial before?

A I have not.

Q Now, you made this statement before

you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct would you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

A Or was guilty, yes.

Q So, we're talking about that?

A Yes.

Q So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?

A Yes.

Q In other words, nothing, there is very few things in life absolutely certain?

A I understand.

Q And that is basically what we're saying to you, and that is what the term reasonable doubt means - -

A (Nodding head).

Q - - that we don't have to prove it beyond all doubt.

Now, we get to the penalty phase and the question becomes slightly different. It presumes life as a person is presumed innocent in the guilt phase, it is presumed that the proper penalty for the beginning point in the penalty phase is life in prison without parole.

Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come in contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're

saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the

death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A Yes, sir.

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the appropriate measure.

MR. MATTHEWS: I have no further questions.

THE COURT: All right. Mr. Deal, there is something that I want to clarify in response to some of the questions that were asked of you.

VOIR DIRE EXAMINATION

BY THE COURT:

Q In your questionnaire it talks about beyond a shadow of a doubt, and the prosecutor here went into that a little further. You realize that that is the standard that the law imposes on the State to prove a case beyond a reasonable doubt. And, obviously, that is a questions of interpretation.

You officiate basketball games. That's in your questionnaire. You, even at the college level, knowing how fast that game is, you have to make a call on some of those calls and you have to decide whether to blow that whistle and make that particular call. Do you think you understand the difference between a reasonable call and beyond a shadow of a doubt type call?

A I guess I do. The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or something over the years. But I guess the point I was making that it has

to be - -

Q You would have to be positive?

A I would have to be positive, that's correct.

Q The State has to convince you?

A Yes.

Q As they would have to convince any reasonable person?

A Yes.

THE COURT: Mr. Deal, let me have you step back into the juryroom. The bailiff will excuse you from there in just a few minutes. Thank you.

Counsel, any challenge to this particular juror?

MR. MATTHEWS: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's

had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

MR. MULLIGAN: We have no objection.

THE COURT: Counsel, the request of the prosecutor's office, we will go ahead and excuse Mr. Deal.

ORIGINAL

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No. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Respondent, Cal Coburn Brown, by through his attorneys, Gilbert Levy and Suzanne Lee Elliott, moves for leave to proceed *in forma pauperis* for the purpose of filing the accompanying response to a petition for a writ of certiorari. Undersigned counsel was appointed to represent Mr. Brown in the district court and court of appeals under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Therefore, Respondent is not required to file a declaration in support of this motion. *See* Supreme Court Rule 39.1.

RESPECTFULLY SUBMITTED this 30th day of November, 2006.

Suzanne Lee Elliott for
Gilbert H. Levy, WSBA 4805
Attorney for Cal Coburn Brown

Suzanne Lee Elliott
Suzanne Lee Elliott, WSBA 12634
Attorney for Cal Coburn Brown

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RESPONSE TO QUESTIONS PRESENTED

1. The Circuit Court reversed and remanded the case to the state court for resentencing without addressing all the claims that Brown properly raised in the District Court and on appeal. Specifically, the Circuit Court declined to address Brown's claim that he was deprived of his Sixth Amendment right to effective assistance of counsel at sentencing, although it recognized that there was potential merit to the claim. Should this Court exercise certiorari jurisdiction when the judgment in the Court of Appeals is not final and where the Circuit Court's decision remanding the case to state court for re-sentencing is the most efficient and economical use of judicial resources?

2. Where the Circuit Court identified the controlling case law from this Court, gave the proper deference to any factual findings made in the state court as required by 28 U.S.C. § 2254(e)(1), and correctly determined that the factual findings were not supported by clear and convincing evidence, is there any basis for review by this Court?

TABLE OF CONTENTS

I. ARGUMENT 1

A. BECAUSE THE CIRCUIT COURT DID NOT ADJUDICATE ALL OF THE MERITORIOUS ISSUES PROPERLY, THIS CASE IS INAPPROPRIATE FOR CERTIORARI *1*

B. JUDGE KOZINSKI'S OPINION FOR THE CIRCUIT COURT IN THIS CASE CORRECTLY STATES THE FACTS AND THE LAW, DOES NOT CONFLICT WITH ANY OTHER DECISIONS BY THIS COURT OR OTHER CIRCUIT COURTS, AND REACHES THE PROPER RESULT *3*

1. The Circuit Court followed all of the pertinent precedent from this Court regarding the standards for a challenge for cause during jury selection in capital cases 4

2. The Circuit Court properly concluded that, while the trial court's factual findings were entitled to deference under the Anti-Terrorism and Death Penalty Act (hereinafter AEDPA), the record in this case did not support those findings 6

3. The other decisions cited by Uttecht do not "conflict" with the Circuit Court opinion in this case within the meaning of Rule 10 10

4. The Court of Appeals correctly determined by clear and convincing evidence that the state court findings were affirmatively refuted by the record. 12

II. CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Adams v. Texas, 448 U.S. 38 (1980) 5, 12

Brown v. Lambert, 451 F.3d 946 (9th Cir. 2006) ..... passim

Clemons v. Luebbers, 381 F.3d 744 (8th Cir. 2004) 11

Darden v. Wainwright, 477 U.S. 168 (1986) 4

Davis v. Georgia, 429 U.S. 122 (1976) 6

Gall v. Parker, 231 F.3d 265 (6th Cir. 2000), *cert. denied, Parker v. Gall*, 533 U.S. 941 (2001) 12

Gray v. Mississippi, 481 U.S. 648 (1987) 6

Hamilton-Brown Shoe Co. v. Wolf Bros. and Co., 240 U.S. 251 (1916) 2

Kinder v. Bowersox, 272 F.3d 532 (8th Cir. 2001) 11

Martini v. Hendricks, 348 F.3d 360 (3rd Cir. 2003) 10

Miller-El v. Dretke, 545 U.S. 231 (2005) 9

Rompilla v. Beard, 545 U.S. 374 (2005) 1

Sallahdin v. Gibson, 275 F.3d 1211 (10th Cir. 2002) 11

Stevens v. Horn, 319 F. Supp. 2d 592 (W.D. Pa. 2004), *affirmed by* 187 Fed. Appx. 205 (3rd Cir. 2006) 11

United States v. Barnette, 211 F.3d 803 (4th Cir. 2000) 11

United States v. Webster, 162 F.3d 308 (5th Cir. 1998) 11

Wainwright v. Witt, 469 U.S. 412 (1985) 4, 5, 12, 13

Wiggins v. Smith, 539 U.S. 510 (2003) 1

Witherspoon v. Illinois, 391 U.S. 510 (1968) 4, 5

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 2254 ..... 9, 11, 14

Rules

Supreme Court Rule 10 ..... 3, 10, 12, 14

Constitutional Provisions

U.S. Const., Amend. 6 (Effective Assistance of Counsel) 1

I. ARGUMENT

A. BECAUSE THE CIRCUIT COURT DID NOT ADJUDICATE ALL OF THE MERITORIOUS ISSUES PROPERLY, THIS CASE IS INAPPROPRIATE FOR CERTIORARI

In the District Court and in the Circuit Court Brown presented a properly exhausted claim that he was deprived of his Sixth Amendment right to effective assistance of counsel at sentencing under this Court's reasoning in *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Wiggins v. Smith*, 539 U.S. 510 (2003). Brown presented evidence that his trial counsel inexcusably failed to properly investigate the penalty phase defense of mental illness after being specifically advised of the need to do so by a consulting expert. The Circuit Court recognized the merit to this claim but declined to reach any conclusion on this claim because it reversed and remanded on the jury issue. The Court stated:

> Brown's final claim is that his attorney provided ineffective assistance in various ways during the sentencing phase of his trial. Were we not granting habeas relief with respect to Brown's sentence for the reasons set forth above, this claim would merit significant attention. Should the state choose to seek the death penalty again on remand, however, Brown will have a new opportunity to receive effective assistance of counsel. We therefore need not reach this claim.

Brown v. Lambert, 451 F.3d 946, 954 (9th Cir. 2006); Pet. App. at 22a-23a.

The applicable jurisdictional statute is Title 28 United States Court § 1254(1), which in pertinent part provides:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

By the express terms of the statute, this Court has jurisdiction to issue the writ although the judgment is not final. However, the general policy favors sparing exercise of this jurisdiction in cases where a final judgment is absent. In *Hamilton-Brown Shoe Co. v. Wolf Bros. and Co.*, 240 U.S. 251 (1916), this Court stated, "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and importance, or in order to secure uniformity of decisions." The Court continued, "And except in extraordinary cases the writ is not issued until final decree."

The policy in favor of minimizing the impact on scarce judicial resources rather strongly suggests that the best course is to allow the case to be remanded to state court for re-sentencing. On the other hand, if this Court grants the petition and reverses on the grounds suggested by the State, it will by no means end the litigation. Instead, there will be yet another round of litigation in the Court of Appeals, another round of petitioning in this Court, and quite possibly a remand for re-sentencing on the basis of the Sixth Amendment claim. Should a remand occur on that basis, the State will have accomplished nothing by the petition now pending in this Court. A more prudent course of action is the one suggested by

the Court of Appeals. A remand for re-sentencing will likely moot out the ineffective assistance claim as well as the jury issue so that this Court will be relieved of the obligation to consider either claim. Nor is this case one of "particular gravity and importance" since it involves nothing more than the resolution of a factual question. Uttecht has failed to cite to any compelling reasons to overcome the general policy that this Court should decline certiorari jurisdiction in the absence of a final decree. For that reason, the petition should be denied.

B. JUDGE KOZINSKI'S OPINION FOR THE CIRCUIT COURT IN THIS CASE CORRECTLY STATES THE FACTS AND THE LAW, DOES NOT CONFLICT WITH ANY OTHER DECISIONS BY THIS COURT OR OTHER CIRCUIT COURTS, AND REACHES THE PROPER RESULT

A petition for certiorari is proper only when a United States Court of Appeals has entered a decision in conflict with the decision of this Court or another United States Court of Appeals on the same important matter. Supreme Court Rule 10. But a petition for writ of certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* As discussed below, the Circuit Court properly stated the rule of law in this case and properly applied that rule of law to the facts. Although Uttecht makes a strained argument that the Circuit Court opinion conflicts with precedent from this Court or opinions of other Circuits, those arguments are meritless.

1. The Circuit Court followed all of the pertinent precedent from this Court regarding the standards for a challenge for cause during jury selection in capital cases.

In support of his petition for certiorari, Uttecht argues that "the Ninth Circuit Panel explicitly refused to follow *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986)." Petition for Certiorari at 15. This is simply untrue.

In its opinion in this case the panel carefully reviewed this Court's controlling precedent regarding jury selection in capital cases. *Brown*, 431 F.3d at 949-50.[1] This Court has held that a juror may not be excluded merely because of conscientious scruples about capital punishment if the juror is "willing to consider all of the penalties provided by state law" and is not "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519.[2]

---

[1] The parties have never had any dispute about the controlling legal principles regarding this issue.

[2] The State, as the moving party, bears the burden of demonstrating that the *Witt* standard is satisfied as to each challenged juror. *Witt*, 469 U.S. at 424.

In *Witherspoon*, this Court held that jurors with scruples against the death penalty could be excused for cause only where it was "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before them, or (2) that their attitude towards the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Witherspoon v. Illinois*, 391 U.S. at 522-23 n.21.

In *Witherspoon* this Court reaffirmed its decision in *Adams v. Texas*, 448 U.S. 38 (1980). In *Adams*, the Court said that the trial court improperly:

> exclude[d] jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

Adams, 448 U.S. at 49-50.

In *Witt*, the Court generalized the test of exclusion, holding that a juror could be excused only where his or her "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

and his oath." *Wainwright v. Witt*, 469 U.S. at 424. In cases following *Witt*, the Court affirmed that the erroneous removal of a juror who could impose the death penalty, but might have scruples about doing so, requires automatic reversal of a death sentence. *Gray v. Mississippi*, 481 U.S. 648 (1987); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam).

Relying on these precedents, Judge Kozinski explicitly stated:

> In 1985, and again in 1987, the Supreme Court explained that the "standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment . . . is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' *Gray v. Mississippi*, 481 U.S. 648, 658, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (quoting *Witt*, 469 U.S. at 424, 105 S.Ct. 844 (quoting *Adams*, 448 U.S. at 45, 100 S.Ct. 2521)). The Supreme Court insisted that capital jurors not be struck for cause unless they are unable to follow the court's instructions. Even jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) (Rehnquist, J.)).

Brown, 451 F.3d at 949-50; Pet App. at 11a - 12a. This is a correct statement of the law. There is no basis for a finding that the Circuit misapprehended the law in any way.

2. The Circuit Court properly concluded that, while the trial court's factual findings were entitled to deference under the Anti-Terrorism and Death Penalty Act (hereinafter AEDPA), the record in this case did not support those findings.

Uttecht's complaint that the Circuit Court did not defer to the Washington State Supreme Court's factual finding that Juror Deal had a view that would prevent or substantially impair his ability to carry out his duties in a capital case was not supported by the record. Again, this is not true.

The Circuit Court was acutely aware of the deference it owed the state court findings under AEDPA. Uttecht does not explain that the Circuit Court actually considered Brown's challenges to three jurors. The panel decision extensively reviewed the transcript of the voir dire of all three and the state court findings as to all three. In two of those circumstances, the Circuit Court found that the record supported the state court findings. The Circuit Court said:

> When the Washington Supreme Court upheld the trial judge's decision to excuse jurors X, Y and Z for cause, it found that both X and Y were "substantially impaired" in their ability to perform their duties as jurors.

Brown, 431 F.3d at 950.

When it came to considering the challenge to Mr. Deal [Juror Z], the Circuit Court's careful examination of whether the record supported the state court findings yielded a different result, however.[3] The Circuit Court examined the Washington State Supreme Court's reasoning and reached two conclusions.

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[3] The Circuit Court included the "entire relevant transcript" of the voir dire of Mr. Deal in a footnote to the opinion. *Brown*, 451 F.3d at 951 n.8. Pet. App. at 14a-17a.

First, the Circuit Court found that: "Nowhere did the Court find that [Mr. Deal] would be unable to follow instructions." *Brown*, 451 F.3d at 950. Uttecht cites only to this portion of the Circuit Court decision. He takes this sentence out of context and argues that Circuit Court somehow understood the law to require express findings by the state courts. Brown has never urged that the state court must use the express phrase "substantially impaired" in order for its findings to be entitled to deference. He has always relied upon the fact that the express record does not support any finding of impairment, no matter how the state court expressed its conclusion otherwise.

Thus, it is notable that Uttecht leaves out of his discussion the very next sentence of the Circuit Court opinion. The Court went on to say:

> Nor could the court have found this: Just like the juror at issue in *Gray*, juror Z "ultimately stated that [he] could consider the death penalty in an appropriate case." *Gray*, 481 U.S. at 653, 107 S.Ct. 2045. Had there been a finding that Z was "substantially impaired" in his ability to follow the law, it would have been unreasonable. See 28 U.S.C. § § 2254(d)(2), (e)(1).

Brown, 451 F.3d at 950-51; Pet. App. at 13a-14a. This passage makes it crystal clear that the Circuit Court understood its obligation to give deference to findings by the state court, examined the state court record to identify any such findings and examined the actual transcript of the voir dire to determine if any such findings, explicit or implicit, were reasonable. The panel expressly cites the

relevant portions of the AEDPA, 28 U.S.C. § 2254(d)(2) and § (e)(1). Nowhere does the Circuit decision require the state court to incant any particular phrase.

At bottom, Uttrecht's argument is that even if the *express* record demonstrates that a juror can follow the law and the instructions, a reviewing court *must* defer to the finding, *implicit* in the trial court's recusal of the juror, that the juror was "substantially impaired." Such a holding would render "*Witherspoon* a dead letter" and "all substantial evidence review of trial court factual findings . . . obsolete." *Brown*, 451 F.3d at 952; Pet. App. 19a.

This argument ignores the fact that the AEDPA permits Brown to rebut the "presumption of correctness" of the state court findings "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The standard is demanding but "not insatiable" and "[d]eference does not by definition preclude relief." *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005). Here, the Circuit Court gave careful consideration to the factual findings of the state courts. The panel decision quotes at length from the voir dire of Mr. Deal and at least one other juror. *Brown*, 451 F.3d at 949-53; Pet. App. 8a –19a. It simply determined that in this case the record, even if accorded deference, did not support those factual findings. After doing so, the Circuit Court reached the conclusion that there was nothing in the record to support the finding that Mr. Deal would not or could not follow the law and the court's instructions. In short, Brown rebutted the "presumption of

correctness" of the state court findings "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). As the Court pointed out:

> In fact, during the course of his voir dire, juror Z stated six times that he could follow the law and impose the death penalty, while not once stating that he might not be able to . . .

Brown, 451 F.3d at 949 n. 5; Pet. App. at 10a.

3. The other decisions cited by Uttecht do not "conflict" with the Circuit Court opinion in this case within the meaning of Rule 10.

The cases that Uttecht alleges conflict with *Brown v. Lambert* are not "conflicting" within the meaning and intent of Rule 10. Uttecht merely cites to cases that apply the same legal principles, but differ in outcome. There is no basis for review in a case where the Circuit Court properly identifies this Court's legal precedents, applies those precedents to particular facts and circumstances, but reaches a conclusion different from other Circuits applying the same precedents to *different* facts and circumstances.

In each of the cases cited by Uttecht, unlike in *Brown*, the Court found that the defendant had failed to rebut the presumption of correctness. For example in the first case cited by Uttecht, *Martini v. Hendricks,* 348 F.3d 360, 368 (3rd Cir. 2003), the Third Circuit, like the Circuit Court here, carefully examined the voir dire of the challenged juror and concluded that Martini had not rebutted the presumption of correctness of the state court findings "by clear and convincing evidence." But in reaching this conclusion the Circuit did note that the

petitioner's claim was a "close and difficult one." *Id.* at 362. The remaining cases that Uttecht alleges "conflict" with the decision here are similar. *See e.g. Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002) ("Sallahdin has failed to rebut the trial court's findings by clear and convincing evidence."); *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000) (record supported the trial court's determination that the juror was substantially impaired); *Clemons v. Luebbers*, 381 F.3d 744 (8th Cir. 2004) ("The trial court's dismissal of these six venire members for cause withstands review under Section 2254(e)."); *Kinder v. Bowersox*, 272 F.3d 532 (8th Cir. 2001) ("Kinder has not rebutted with any evidence—much less clear and convincing evidence—the presumption that the Missouri Supreme Court's findings concerning juror bias are reasonable.").[4]

In response, Brown can cite to federal court cases where defendants like him have rebutted the presumption of correctness and that reach the same conclusion as the Circuit Court here. *See e.g. Stevens v. Horn*, 319 F. Supp. 2d 592 (W.D. Pa. 2004), *affirmed by* 187 Fed. Appx. 205 (3rd Cir. 2006) (district court concluded that finding of juror bias was not supported by state court factual findings and, thus, was "unreasonable within the meaning of § 2254(d)(2)."); *Gall*

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[4] *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998) is wholly inapplicable. In that case, Webster had not exhausted all of his peremptory challenges, thus, the Court found that he could not demonstrate that he had been denied his Sixth Amendment right to an impartial jury. The Court only considered whether the

v. Parker, 231 F.3d 265, 331 (6th Cir. 2000), *cert. denied*, *Parker v. Gall*, 533 U.S. 941 (2001) ("Notwithstanding the deference owed to the trial judge, we find that the factual record does not fairly support [the juror's] exclusion under the standards of *Adams* and *Witt*.").

There is no doubt that in applying the controlling precedent from this Court, the lower courts can reach different conclusions as to whether or not the state court findings are supported by clear and convincing evidence. But differing outcomes are not the kind of "conflict" that necessitates review under Rule 10. Review is, therefore, inappropriate on that basis.

4. The Court of Appeals correctly determined by clear and convincing evidence that the state court findings were affirmatively refuted by the record.

The record makes it unmistakably clear that Juror Deal was not substantially impaired in his ability to consider and vote for the death penalty. He stated without hesitation that he was satisfied with the reasonable doubt standard and that he would be willing to follow the law.[5] He stated that he would be willing to consider the death penalty after being informed by the prosecutor that

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trial court had wrongfully reduced the defendant's right to exercise preemptory challenges. *Id.* at 342.

[5] When questioned by the deputy prosecutor he responded as follows, "Q: So you would be satisfied with a reasonable doubt standard? You would be willing to follow the law? A: Yes." ER 38.

Brown would never get out of prison and therefore would not be given the opportunity to kill again.[6]

According to this Court's decision in *Wainwright v. Witt,* the question of whether a trial court properly excused a juror for cause is essentially one of fact. The trial court is not obligated to make a specific finding that the juror was substantially impaired so long as there is a basis in the record for drawing such a conclusion, and in habeas corpus there is a presumption of correctness that attaches to the trial court's implicit finding. That being said, the presumption is not irrefutable and the trial court's finding must be "fairly supported by the record as a whole." *Id.* at 433.[7] In this case, it is not simply that the record does not fairly support the trial court's finding, but rather that the record affirmatively refutes any suggestion that Juror Deal would be unwilling to follow the law or vote for the death sentence if such a sentence was warranted by the evidence

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[6] When questioned by the deputy prosecutor on this point, juror Deal responded as follows, "Q: But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out of out again, which would be the situation in this case, so you think you could also consider and vote for the death penalty under those circumstances? A: I could consider it, yes. Q: Then could you impose it? A: I could if I was convinced that was the appropriate measure." ER 41.

[7] This Court in *Witt* also made clear that a contemporaneous objection by trial counsel does not preclude reversal provided that the state appellate court adjudicates the question on the merits, which is precisely what happened in this case. 469 U.S. at 429, n. 11.

presented at trial. That is the precisely the reason the Court of Appeals granted the writ.

Under AEDPA, a federal court may grant the writ where the state court decision was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceedings." *See*, Title 28 United States Code § 2254(d)(2). In this case, the state court record affirmatively demonstrates that the juror who was excused for cause was not substantially impaired in his ability to consider and vote for the death penalty. Under these specific facts, the Court of Appeals decision was a correct application of the AEDPA standard and this Court should therefore decline to grant the writ.

II. CONCLUSION

The Circuit Court meticulously reviewed the state court record and applied settled principles of law, including provisions of the AEDPA. The Circuit Court properly concluded that the state court record did not support a finding that Juror Deal was "substantially impaired" in his ability to follow the law. Thus, Uttecht has failed to present "compelling reasons" for review as required by Rule 10.

Moreover, this case is a poor vehicle for determining any issue because the Circuit Court left unresolved a compelling sentencing issue that would be an alternative basis for reversing the death sentence were this case remanded to the Circuit Court. For these reasons, this Court should deny Uttecht's petition for writ of certiorari.

Respectfully submitted this 30th day of November, 2006.

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22

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NO. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

1. The Ninth Circuit's Opinion Is A Final Judgment, Granting Habeas Relief And Vacating Brown's Sentence Of Death. 2

2. The Ninth Circuit Applied An Erroneous Standard In Granting Habeas Corpus Relief. 4

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Clemmons v. Luebbers,
381 F.3d 744 (8th Cir. 2004) 8

Darden v. Wainwright,
477 U.S. 168 (1986) 4, 5, 8

Gray v. Mississippi,
481 U.S. 648 (1987) 4

In re Brown,
143 Wash.2d 431,
21 P.3d 687 (2001) 3

Kinder v. Bowersox,
272 F.3d 532 (8th Cir. 2001) 8

Martini v. Hendricks,
348 F.3d 360 (3rd Cir. 2003) 8

Patton v. Yount,
467 U.S. 1025 (1984) 7

Reynolds v. United States,
98 U.S. 145 (1879) 7

Rice v. Collins,
126 S. Ct. 969 (2006) 8

Wainwright v. Witt,
469 U.S. 412 (1985) 4, 5, 7

Witherspoon v. Illinois,
391 U.S. 510 (1968) 4

Statutes

28 U.S.C. § 2254 ..... 5, 6

INTRODUCTION

Uttecht seeks review of the Ninth Circuit's opinion that grants a writ of habeas corpus and vacates Brown's sentence of death. Brown presents two arguments in opposition to Uttecht's petition. First, Brown presents the incredulous argument that the Ninth Circuit's decision, even though it vacates Brown's sentence of death, and requires the state court to either conduct a new penalty phase trial or re-sentence Brown to life imprisonment, is somehow not a final judgment in this habeas corpus proceeding. Second, Brown attempts to recast the Ninth Circuit's decision. Brown argues the Ninth Circuit did not ignore an implicit finding of fact by the state court, but actually recognized the existence of this finding. Brown further argues the circuit court determined that Brown had rebutted this factual finding by clear and convincing evidence. Neither of Brown's arguments is well taken.

The Ninth Circuit's decision constitutes a final judgment. The decision grants Brown a writ of habeas corpus and terminates the habeas corpus proceedings. The policy cited by Brown for deferring review of non-final decrees does not apply in this case. And, contrary to Brown's arguments, the Ninth Circuit applied an incorrect legal standard in granting relief. The Ninth Circuit failed to apply the law established by statute and this Court's precedent because the circuit court ignored the state court's implicit determination of the critical factual issue, and failed to give proper deference to the state court's adjudication of federal law. The Court should grant the petition for a writ of certiorari, and summarily reverse the decision of the Ninth Circuit.

ARGUMENT

1. The Ninth Circuit's Opinion Is A Final Judgment, Granting Habeas Relief And Vacating Brown's Sentence Of Death.

Brown argues the Court should not exercise its jurisdiction to grant the petition for a writ of certiorari because the Ninth Circuit's opinion is somehow not a final judgment. Brown argues that, because the Ninth Circuit did not reach his claim that counsel provided ineffective assistance during the penalty phase trial, the Ninth Circuit's decision vacating his sentence is not a final decree. Brown's incredulous argument misstates the law and the facts, and should be disregarded.

The Ninth Circuit's opinion constitutes a final judgment in this case. The court directed the issuance of a writ of habeas corpus, thereby vacating Brown's sentence of death. Pet. App. at 23a. The decision gives Brown the ultimate relief requested in his appeal. Under the Ninth Circuit judgment, the state court must either conduct a new penalty phase trial or re-sentence Brown to life imprisonment without parole (the only alternative sentence allowed under Washington law for a conviction of aggravated murder). Pet. App. at 23a. Other than the ministerial issuance of an order by the district court, there is nothing left to be done in federal court under the Ninth Circuit's ruling. Contrary to Brown's assertions, the Ninth Circuit's decision is a final judgment subject to review by this Court. The policy cited by Brown for deferring review on interlocutory decrees simply does not apply in this case.

A State suffers severe prejudice whenever a federal court grants habeas corpus relief to overturn a judgment of a state court. Under Brown's argument, however, the State would not have the opportunity to seek redress unless the circuit court resolved every claim raised by the habeas corpus petitioner on appeal. In fact, under Brown's argument, a circuit court could shield from review its decisions in a habeas corpus proceeding simply by granting the writ based upon one claim and declining to reach other claims. Under Brown's argument, review would never be proper since the judgment was not "final" and the alleged error not considered by the circuit court could always be rendered moot by a new trial in state court. Brown's proposal would not serve the interests of justice, and would in fact conflict with the principles of comity and federalism which underlie habeas corpus actions.

Brown also omits an important fact when he asserts that the unresolved claim of ineffective assistance renders the Ninth Circuit's decision a less than final judgment. Although Brown suggests the Ninth Circuit might rule in his favor on the claim of ineffective assistance of counsel, he omits the fact that every court to have considered the claim has rejected it. The state court denied the claim in Brown's personal restraint petition proceedings. *In re Brown*, 143 Wash.2d 431, 449-51 and 456, 21 P.3d 687 (2001). The district court also denied the claim after conducting an extensive evidentiary hearing. Pet. App. at 79a-89a. Brown's claim of ineffective assistance of counsel does not prevent review of the Ninth Circuit's opinion granting a writ of habeas corpus.

2. The Ninth Circuit Applied An Erroneous Standard In Granting Habeas Corpus Relief.

Brown argues the Ninth Circuit stated the correct rule of law and properly applied that rule to the facts of this case. Brown is mistaken.[1]

The Ninth Circuit did cite to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Gray v. Mississippi*, 481 U.S. 648 (1987) and *Wainwright v. Witt*, 469 U.S. 412 (1985) for the rule that improper removal of a juror for cause will entitle the defendant to a new trial. However, the Ninth Circuit failed to apply the remaining elements of this rule. The Ninth Circuit failed to apply the rule that a trial judge's decision to remove a juror, especially in the absence of a defense objection, constitutes an implicit factual determination that the juror was substantially impaired in the ability to perform the duties of a juror. *Witt*, 469 U.S. at 429-30; *Darden v. Wainwright*, 477 U.S. 168, 175-78 (1986). The Ninth Circuit failed to apply the rule that a federal court, when reviewing the decision to remove a juror, must presume correct the state court's implicit determination that the juror was substantially impaired. *Witt*, 469 U.S. at 429. And the Ninth Circuit failed to apply the rule that a petitioner must

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[1] Brown writes it is "notable" that Uttecht's petition left out a pertinent discussion from the Ninth Circuit's decision. Br. Opp. at 8 (citing Pet. App. at 13a-14a.). Actually, the petition quoted from this discussion. Pet. at 11-12. What is notable is that the Ninth Circuit never stated that Brown had rebutted by clear and convincing evidence the state court's finding of fact that Mr. Deal was substantially impaired.

rebut such a state court finding of fact by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In an attempt to save the Ninth Circuit's decision, Brown recasts the Ninth Circuit's reasoning by indirectly suggesting that the circuit court did recognize the existence of the state court's finding of fact concerning Juror Deal's substantial impairment, but found that Brown had rebutted any such state court finding of fact. Br. Opp. at 7-10. However, the panel majority never recognized the existence of the state trial judge's implicit finding. Contrary to Brown's suggestion, the Ninth Circuit expressly concluded that the state court made no such finding of fact concerning Juror Deal. Pet. App. at 13a-14a (determining that, unlike jurors X and Y, the state court never found juror Z was substantially impaired in his ability to follow instructions). If one never recognizes the existence of a fact, one cannot rebut the fact. Since the Ninth Circuit never recognized the existence of the state court's finding of fact concerning Mr. Deal, the circuit court never required Brown to rebut the finding by clear and convincing evidence. The Ninth Circuit failed to apply the rule in *Witt* and *Darden*, and the circuit court failed to apply the presumption of correctness imposed under 28 U.S.C. § 2254(e)(1).

Brown also argues the Ninth Circuit correctly disregarded any state court finding of fact concerning Mr. Deal because the state court record (*e.g.*, the trial transcript) does not support such a finding. Br. Opp. at 7-9. This is not the proper standard of review under 28 U.S.C. § 2254(e)(1). Unlike the prior version of the habeas statute, the statutory presumption of correctness for state court findings of

fact is now unconditional. The current statute eliminated the exceptions to the presumption of correctness listed in former 28 U.S.C. § 2254(d), including the exception that allowed the federal court to disregard a state court finding of fact if the finding was not supported by the record. *Compare*, current 28 U.S.C. § 2254(e)(1) and former 28 U.S.C. § 2254(d). The statute now simply declares "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The federal courts must apply the presumption of correctness until the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Assuming Brown is correct that the Ninth Circuit recognized the factual finding, but disregarded the finding because it was not supported by the record, the circuit court applied the incorrect statutory standard for reviewing a state court finding of fact. The Ninth Circuit applied the incorrect law because the court did not require that Brown rebut the state court's finding by clear and convincing evidence.

Brown argues the Ninth Circuit's decision does not conflict with the circuit court decisions cited in Uttecht's petition because the court, like the other circuits, required Brown to rebut the finding of fact by clear and convincing evidence. Br. Opp. at 10-12. However, the Ninth Circuit never recognized the existence of the state court finding of fact, and never required Brown to rebut the finding by clear and convincing evidence.

Finally, Brown argues the Ninth Circuit could disregard the state court's factual findings in this case because "the record makes it unmistakably

clear" that Mr. Deal was not substantially impaired. Br. Opp. at 12. In doing so, Brown asserts the unique rule adopted by the Ninth Circuit; that a federal court need not give deference to a state trial judge's determination if the circuit court believes the trial transcript reflects the "witness's clear words." Pet. App. at 17a n.8. This rule directly conflicts with the holdings of this Court.

The trial judge's observations of credibility and demeanor play an important role in interpreting what the Ninth Circuit described as Mr. Deal's "clear words." The fact is that prospective jurors "may be unable to articulate, or may wish to hide their true feelings." *Witt*, 469 U.S. at 425. "Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying." *Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984). "[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Reynolds v. United States,* 98 U.S. 145, 156-157 (1879). "This is why deference must be paid to the trial judge who sees and hears the juror." *Witt*, 469 U.S. at 426.

The trial judge has the singular opportunity to assess each juror's demeanor, inflection, and credibility during the voir dire process, placing that judge in a position far superior to the reviewing courts to determine the "real character" of the prospective juror's impartiality. *Patton*, 467 U.S. at 1037-38 & nn.12 & 14. The Ninth Circuit's standard that accepts the cold record of the appellate transcript over the observations of the trial judge

fails to give the proper deference to the state court's finding of fact. *Rice v. Collins*, 126 S. Ct. 969, 974-76 (2006). The Ninth Circuit's willingness to disregard the trial judge's ability to view demeanor and credibility, in favor of the cold record, conflicts with the holdings of this Court and other circuit courts. *See, e.g., Darden*, 477 U.S. at 178 (quoting *Witt*, 469 U.S. at 424); *Kinder v. Bowersox*, 272 F.3d 532, 543 (8th Cir. 2001); *Clemmons v. Luebbers*, 381 F.3d 744, 756 (8th Cir. 2004); *Martini v. Hendricks*, 348 F.3d 360, 363-68 (3rd Cir. 2003). Contrary to Brown's arguments, the Ninth Circuit did not recognize the state court finding of fact, and the circuit court did not require Brown to rebut the finding with clear and convincing evidence.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be summarily reversed.

RESPECTFULLY SUBMITTED.

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TABLE OF CONTENTS

REPLY BRIEF FOR THE PETITIONER 1

1. Brown Failed To Rebut With Clear And Convincing Evidence The State Courts' Finding Of Fact That Mr. Deal Was Substantially Impaired 1

   a. The State Courts' Finding That Mr. Deal Was Substantially Impaired Is Entitled To The Presumption Of Correctness Under § 2254(e)(1) 2

   b. The Trial Court's Decision To Remove Mr. Deal Is Entitled To Deference 2

   c. Brown Has Not Met His Burden Under § 2254(e)(1) 5

2. The State Court Decision Was A Reasonable Application Of Federal Law In Light Of The State Court Factual Findings 9

   a. The State Court Decision Was Not Contrary To Clearly Established Federal Law 10

   b. The State Court Decision Was Not An Unreasonable Application Of Federal Law 10

3. The State Court Decision That Mr. Deal Was Substantially Impaired Was Not Based On An Unreasonable Determination Of Facts Under § 2254(d)(2) 15

4. Conclusion 18

TABLE OF AUTHORITIES

Cases

Bradshaw v. Richey
126 S. Ct. 602 (2005).....3, 6, 14

Burden v. Zant
498 U.S. 433 (1991)..... 6

Darden v. Wainwright
477 U.S. 168 (1986).....1–4, 11, 16

Estelle v. McGuire
502 U.S. 62 (1991).....14

Gomez v. United States
490 U.S. 858 (1989)..... 6

Holland v. Jackson
542 U.S. 649 (2004).....10

LaVallee v. Delle Rose
410 U.S. 690 (1973)..... 3

Lockyer v. Andrade
538 U.S. 63 (2003).....10, 11

Maggio v. Fulford
462 U.S. 111 (1983)..... 6

Marshall v. Lonberger
459 U.S. 422 (1983)..... 5

Miller-El v. Dretke
545 U.S. 231 (2005).....16

Morgan v. Illinois
504 U.S. 719 (1992).....17

Mullaney v. Wilbur
421 U.S. 684 (1975).....14

Patton v. Yount
467 U.S. 1025 (1984).....6, 8, 17

Rice v. Collins
126 S. Ct. 969 (2006) 16

Rushen v. Spain
464 U.S. 114 (1983) 5

Strickland v. Washington
466 U.S. 668 (1984) 4

Sumner v. Mata
449 U.S. 539 (1981) 6

Wainwright v. Witt
469 U.S. 412 (1985) 1–4, 6–8, 10–12, 16, 17

Williams v. Taylor
529 U.S. 362 (2000) 11

Witherspoon v. Illinois
391 U.S. 510 (1968) 8

Woodford v. Visciotti
537 U.S. 19 (2002) 11

Yarborough v. Alvarado
541 U.S. 652 (2004) 11

Statutes

28 U.S.C. § 2254 1

28 U.S.C. § 2254(d)(1) 8–10, 15

28 U.S.C. § 2254(d)(2) 15, 16

28 U.S.C. § 2254(e)(1) 1–3, 5, 9, 16

REPLY BRIEF FOR THE PETITIONER

Brown states that the Ninth Circuit's opinion "is not entirely clear as to which precise section of the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] controls this case." Br. Resp't 10. This is an understatement. Apart from a few fleeting references to 28 U.S.C. § 2254 (Pet. App. 14a, 19a), the Ninth Circuit did not apply the standards required by AEDPA and, instead, simply substituted its judgment for that of the trial court and the Washington Supreme Court. When the proper standards of § 2254 are applied, the decision below must be reversed.

1. Brown Failed To Rebut With Clear And Convincing Evidence The State Courts' Finding Of Fact That Mr. Deal Was Substantially Impaired

Under AEDPA "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1), J.A. 160. The determination that a juror is substantially impaired is a factual determination that necessarily requires evaluation of the juror's credibility, including the juror's demeanor. *Wainwright v. Witt*, 469 U.S. 412, 429 (1985); *Darden v. Wainwright*, 477 U.S. 168, 175–76 (1986). For this reason, the trial court's ability to evaluate a juror's demeanor during voir dire is entitled to deference by the reviewing court in a habeas corpus proceeding. *Witt*, 469 U.S. at 424–26; *Darden*, 477 U.S. at 178. The Ninth Circuit in the decision below erred by refusing to grant the presumption of correctness to the state courts' finding that Mr. Deal was substantially impaired. The circuit court also erred by refusing to grant any deference to the trial court's ability to evaluate Mr. Deal's demeanor.

a. The State Courts' Finding That Mr. Deal Was Substantially Impaired Is Entitled To The Presumption Of Correctness Under § 2254(e)(1)

The Ninth Circuit avoided the requirement of § 2254(e)(1) because it held that the state courts never entered a finding that Mr. Deal was substantially impaired. Pet. App. 13a, 19a–20a n.10.

This holding is fundamentally incorrect. The Washington Supreme Court expressly stated that Mr. Deal was substantially impaired. Pet. App. 208a ¶ 10; Br. Pet'r 23. And the trial court's decision granting the prosecutor's challenge that Mr. Deal was substantially impaired constituted an implicit finding of fact that was entitled to the presumption of correctness. In both *Witt* and *Darden*, this Court accorded the presumption of correctness to the dismissal of a juror without an express finding that the juror was substantially impaired. *Witt*, 469 U.S. at 430; *Darden*, 477 U.S. at 175; Pet. Br. 23–26. Even Brown now retreats from the decision below and "assumes that AEDPA standards of review apply to both implicit and express findings by state trial courts." Br. Resp't 19 n.7.

Based on Brown's statement, the parties agree that the state courts' finding that Mr. Deal was substantially impaired is entitled to the presumption of correctness, and the burden is on Brown to overcome the presumption with clear and convincing evidence.

b. The Trial Court's Decision To Remove Mr. Deal Is Entitled To Deference

The Ninth Circuit held that the trial judge's ability to observe Mr. Deal's demeanor was not entitled to any deference because the transcript of the voir dire was clear. Pet. App. 17a n.8. There is no clear transcript exception to the requirement that a federal court,

in a habeas case, grant deference to the trial court's ability to evaluate a juror's demeanor during voir dire. Br. Pet'r 33–35.

Brown argues that the Court should grant deference to the trial court only where the record contains some express evidence regarding the juror's demeanor.[1] Br. Resp't. 24–25. Brown cites no authority to support this claim, and it is contrary to this Court's precedent.[2] In both *Witt* and *Darden*, this Court granted deference to the trial court, even though there was no express evidence in the transcripts regarding the jurors' demeanor. In *Witt*, this Court explained, whether a juror is substantially impaired "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 469 U.S. at 428. *Witt* affirmed the challenge to the juror because "although not crystal clear from the printed record," the reason why no one in the courtroom questioned the juror's excusal "may well have been readily apparent to those viewing Colby as she answered the questions." *Witt*, 469 U.S. at 435. In *Darden*, the Court stated that the "trial court, aided as it undoubtedly was by its assessment of the potential juror's demeanor, was under the obligation to determine whether [the juror's] views would prevent or substantially

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[1] Contrary to Brown's claim, there is some evidence of Mr. Deal's demeanor in the transcript. In making his challenge, the prosecutor described Mr. Deal as "very confused" and stated that Mr. Deal "has some real problems" about a defendant having to be in a position to kill again before he could impose the death penalty. J.A. 75.

[2] Brown's argument suggests that Uttecht bears some burden to support the state court finding of fact, and that the Court should not defer to the trial judge absent some proof as to Mr. Deal's demeanor. However, under 28 U.S.C. § 2254(e)(1), Brown bears the burden of rebutting the finding by clear and convincing evidence. Uttecht bears no burden to support the finding. *See Witt*, 469 U.S. at 435; *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005); *LaVallee v. Delle Rose*, 410 U.S. 690, 695 (1973).

impair the performance of his duties as a juror." *Darden*, 477 U.S. at 178 (citations and internal quotation marks omitted).

Brown's claim that deference is only required when there is evidence of demeanor in the record is especially misplaced when, as in this case, defense counsel does not object to the challenge. In both *Witt* and *Darden*, this Court found it noteworthy that defense counsel did not object to the prosecutor's challenge that the jurors in those cases were substantially impaired. *Witt*, 469 U.S. at 430–31 ("it is noteworthy that in this case the court was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to juror Colby's recusal, or to attempt rehabilitation"); *Darden*, 477 U.S. at 178 ("No specific objection was made to the excusal of Murphy by defense counsel.").

Brown argues that defense counsel's failure to object does not constitute waiver of his claim that Mr. Deal was improperly dismissed. Br. Resp't 29–31. Brown's argument misses the point. We do not argue that defense counsel's failure to object waived Brown's claim. Rather, the failure to object is a factor to consider in reviewing the trial court's action. The Court in *Witt* spoke directly to this point, stating that "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims." *Witt*, 469 U.S. at 431 n.11. There is no claim that Brown's defense counsel provided ineffective assistance in failing to object to Mr. Deal's removal. Br. Pet'r 39. Counsel is presumed to have provided reasonably competent representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The courts therefore must presume that, if defense counsel believed Mr. Deal was not substantially impaired,

he would have objected to the prosecution's challenge for cause.

c. Brown Has Not Met His Burden Under § 2254(e)(1)

Brown argues that there is clear and convincing evidence in the record that Mr. Deal was fit to serve on the jury. Br. Resp't 20. Brown primarily relies on one question and answer in the transcript:

> "But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?
>
> "Juror Deal's unequivocal answer was:
>
> I could consider it, yes. JA 73." Br. Resp't 14.

Brown also emphasizes that Mr. "Deal never said he could only impose the death penalty if there were proof that the defendant would kill again." Br. Resp't 13.

Apart from Brown's selective reading of the transcript, discussed below, his argument essentially is that a federal court may substitute its judgment for that of the trial court on the factual issue of substantial impairment if, after an independent review of the voir dire transcript, the federal court simply disagrees with the state court's finding. The presumption of correctness "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Rushen v. Spain*, 464 U.S. 114, 121 n.6 (1983); *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). The statute does not allow the federal court to simply substitute its own judgment for that of the state court on

a factual issue. *Maggio v. Fulford*, 462 U.S. 111, 113 (1983). This is especially true where the federal court is simply reviewing the identical transcripts reviewed by the state court. *Sumner v. Mata*, 449 U.S. 539, 547 (1981). The federal court may not disregard the state court finding of fact unless the federal court first specifically determines that the evidence clearly and convincingly rebuts the state court finding of fact. *Bradshaw v. Richey*, 126 S. Ct. 602, 605 (2005); *see also Sumner*, 449 U.S. at 548–49; *Burden v. Zant*, 498 U.S. 433, 437 (1991).

Brown's argument also ignores the deference owed to the trial court. "[N]o transcript can recapture the atmosphere of the voir dire . . . ." *Gomez v. United States*, 490 U.S. 858, 875 (1989). A trial court's determination that a juror is substantially impaired is based upon more than mere spoken words. It includes not only what is said, but also how it is said and the context in which the statements are made. The determination is based on the trial judge's observations of the entire voir dire process, including observations of the juror, the flow of the questions and answers, the prosecution's challenge for cause, and the response of defense counsel to the challenge. *Witt*, 469 U.S. at 424–26, 431 n.11; *Patton v. Yount*, 467 U.S. 1025, 1037–39 & n.14 (1984). An appellate court's review of a cold transcript that captures only one isolated portion of the entire jury selection process cannot rebut, by clear and convincing evidence, the finding that a juror is substantially impaired. Thus, even when a juror's "clear words" are that the juror could follow the law and impose the death penalty in a particular case, the question remains, "should the juror's protestation of impartiality have been believed." *Patton*, 467 U.S. at 1036. That question cannot be answered by review of a cold transcript.

Even if simple re-evaluation of the transcript by a federal court sitting in habeas could constitute clear and convincing evidence required to rebut a state court

finding of substantial impairment, Brown's argument here would fail. Brown asserts that the state court findings are rebutted simply because, at one point, Mr. Deal said he could consider imposing the death penalty. Brown's claim thus focuses on a single question, ignoring the rest of the voir dire. The trial court "views the questioning as a whole." *Witt*, 469 U.S. at 435. Indeed, "[o]ne of the purposes of [the statutory presumption of correctness] was to prevent precisely this kind of parsing of trial court transcripts to create problems on collateral review where none were seen at trial." *Witt*, 469 U.S. at 435. Focusing on an isolated answer to a single question cannot be the proper standard, because it improperly restricts the determination of bias. "[J]uror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424. When the voir dire is viewed as a whole, there is no clear and convincing evidence that the state court's findings are incorrect. Mr. Deal was repeatedly asked about his views regarding the death penalty, and his answers were inconsistent. Mr. Deal said he could consider the death penalty, but he also said that the death penalty would be appropriate "if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62. Given the inconsistency in Mr. Deal's testimony, his answer to a particular question is not clear and convincing evidence to overcome the presumption that the state courts' findings were correct.

Moreover, contrary to Brown's argument, it was not necessary for Mr. Deal to say that he could never impose the death penalty for the state court to find him substantially impaired. The law does not require that a juror would automatically vote against the death penalty before he may be dismissed as impaired. *Witt*, 469 U.S. at 424. Nor is there a burden to prove bias with "unmistakable clarity." *Id.* at 421, 424. Instead,

regardless of what is said in response to a question, a judge may still determine the juror is substantially impaired if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Witt*, 469 U.S. at 426.[3] The judge may choose to believe those statements that were the most fully articulated and least influenced by leading questions. *Patton*, 467 U.S. at 1039. Thus, the judge could give weight to Mr. Deal's repeated statements of when he believed the death penalty was appropriate, and discount as being influenced by leading questions the limited answer that he could consider and impose the death penalty. Based upon his observations of Mr. Deal throughout the voir dire, the judge could determine that Mr. Deal would be substantially impaired in his ability to consider and impose the death penalty unless the defendant would be in the position to be released and reoffend. This determination of credibility, of deciding which answers should be believed and given the most weight, is peculiarly within a trial judge's province. *Witt*, 469 U.S. at 428.

There also are two other parts of the record that Brown's claim of clear and convincing evidence cannot overcome. The first is the fact that defense counsel did not object to the prosecutor's challenge of Mr. Deal. Defense "counsel's failure to speak . . . is a circumstance we feel justified in considering when assessing respondent's claims." *Witt*, 469 U.S. at 431 n.11.

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[3] The argument that Mr. Deal must have expressly said he could not impose the death penalty is the equivalent of the standard suggested by dicta in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), that the prosecution must show by unmistakable clarity that the juror could never impose the death penalty. The heightened standard suggested by Brown and his supporting amici, which was rejected by *Witt*, is not clearly established by the holdings of the Court and does not apply under 28 U.S.C. § 2254(d)(1).

Second, the record establishes that the trial judge in this case would not grant a challenge for cause unless the judge determined the juror was substantially impaired based upon the judge's own observations of that particular juror during voir dire. *See, e.g.*, J.A. 38–39 (denying prosecution's challenge because the judge found credible Juror Obeso's responses that he could follow instructions and consider both sentences); J.A. 117–18 (granting prosecution's challenge because Juror Henderson's "unsaid" body language was more convincing than her words). The prosecution challenged twelve jurors for cause based upon their views on the death penalty. J.A. 127–40. Defense counsel objected to seven of those twelve challenges. The trial court sustained defense counsel's objection as to five of the jurors, and overruled the objection as to the other two. *See* J.A. 127–40. Thus, the record establishes that the trial judge was carefully evaluating each challenge on its merits.

In sum, Brown has not met his burden under § 2254(e)(1). The presumption of correctness and the deference owed the trial court cannot be overcome by focusing on one question and answer in the transcript and the fact that Deal did not say he could never impose the death penalty. When the transcript is viewed as a whole, in light of the fact that defense counsel did not object and the trial judge's careful consideration of challenges to jurors throughout the voir dire, Brown has not met his burden.

2. The State Court Decision Was A Reasonable Application Of Federal Law In Light Of The State Court Factual Findings

28 U.S.C. § 2254(d)(1) provides that an applicant must prove that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States . . . ." Brown does not satisfy either prong of § 2254(d)(1).

a. The State Court Decision Was Not Contrary To Clearly Established Federal Law

The Ninth Circuit granted habeas relief under § 2254(d)(1), because it determined that the state court "*applied the wrong standard*" and this "was directly contrary to Supreme Court precedent . . . ." Pet. App. 19a. A judge properly dismisses a prospective juror where "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Both the trial court and the Washington Supreme Court applied this standard. Br. Pet'r 26–31. Brown agrees that *Witt* sets out the correct legal standard (Br. Resp't 11–12), and Brown abandons the claim that the state court decisions were contrary to clearly established federal law under § 2254(d)(1). Br. Resp't 10.

b. The State Court Decision Was Not An Unreasonable Application Of Federal Law

Brown argues that the Washington Supreme Court's decision was an unreasonable application of clearly established federal law, entitling him to relief under § 2254(d)(1). Br. Resp't 11–19. Although Brown quotes the statute, his argument ignores the high burden he must meet. The unreasonable application prong of § 2254(d)(1) allows relief only if the "'state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). This standard requires "the state court decision to be more than incorrect or erroneous." *Lockyer*

v. Andrade, 538 U.S. 63, 75 (2003). Even "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* To obtain relief, the decision must be objectively unreasonable. *Id.* at 75–76. Thus, § 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). It "demands that state-court decisions be given the benefit of the doubt." *Id.* "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Id.* "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). In addition, whether a decision was reasonable depends upon the specificity of the rule. "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Brown cannot satisfy this high burden. Whether a juror is substantially impaired is an issue of fact, determined primarily by the trial judge's observations of the juror during voir dire. *Witt*, 469 U.S. at 429–30; *Darden*, 477 U.S. at 175–76. Under clearly established federal law, whether a judge properly removed a juror depends upon whether there is a factual determination as to that juror's ability to perform the duties of a juror. If there is a factual determination that the juror was substantially impaired, then the state court decision cannot be objectively unreasonable. In this case, both the trial court and the Washington Supreme Court applied the standard in *Witt* and found that Mr. Deal's views on the death penalty would prevent or substantially impair the performance of his duties as a juror. Brown has not met his burden to establish, by clear and convincing

evidence, that these findings are incorrect. Accordingly, the Washington Supreme Court's decision upholding the trial court was not an objectively unreasonable application of the *Witt* standard.

Brown makes two arguments in challenging the Washington Supreme Court's application of federal law. First, Brown argues that the Washington Supreme Court found only that Mr. Deal was confused about Washington law, and that confusion is not a proper basis for challenging for cause in a capital case. Br. Resp't 12–13. However, Brown ignores the Washington Supreme Court's express finding that Mr. Deal was substantially impaired in his ability to follow the court's instructions and to abide by his oath as a juror. The Washington Supreme Court held:

> "The trial court *properly exercised its discretion in excusing for cause* prospective jurors Ms. Lisa Denis, Ms. Kristin A. Henderson and *Richard Deal* during voir dire. Their *views would* have prevented or *substantially impaired their ability* to follow the court's instructions and abide by their oaths as jurors." Pet. App. 208a ¶ 10 (emphasis added).

Moreover, the Washington Supreme Court did not rule that Mr. Deal was substantially impaired because he was confused. When the prosecution challenged Mr. Deal, the prosecutor referred to Mr. Deal's demeanor—describing Mr. Deal as "very confused" about statements of a defendant having to kill again. J.A. 75. The Washington Supreme Court ruled that the trial court did not abuse its discretion in excusing Mr. Deal because: "On voir dire [Mr. Deal] indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. In sum, the Washington Supreme Court did not apply the wrong standard in this case.

Second, Brown argues for the first time in this Court that the Washington Supreme Court misunderstood Washington's capital punishment scheme by failing to recognize that future dangerousness is a proper factor for a juror to consider in the penalty phase of a capital case under Washington law. Br. Resp't 14–19. Brown's argument is without merit.

To begin with, Brown mischaracterizes both the Washington Supreme Court's decision and Mr. Deal's testimony. The Washington Supreme Court did not hold that Mr. Deal was substantially impaired because he would consider future dangerousness as a relevant mitigating factor. Rather, the Washington Supreme Court accepted the prosecutor's challenge that Mr. Deal would only vote to impose the death penalty where the defendant would reviolate if released. J.A. 75; Pet. App. 173a. There is a material difference between a juror who says death is only appropriate where it is proven the defendant will reviolate if released and a juror who would consider lack of future dangerousness as mitigating evidence in deciding whether to impose death or life. The former juror is saying I will not impose death if the defendant cannot reviolate. The latter juror is saying I can consider all of the evidence and then reach an impartial decision.

Brown also mischaracterizes Mr. Deal's testimony. He did not testify generally about lack of dangerousness as a mitigating factor. Rather, he testified about situations when death would be appropriate. In his questionnaire, Mr. Deal stated that death would be appropriate if "a person has killed and would kill again." J.A. 69. He testified, "if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62. And he testified, "I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70. In fact, the only situations where Mr. Deal testified that the

death penalty would be appropriate is when the defendant would reoffend or if the defendant "wanted the death penalty." J.A. 59. The prosecution argued that Mr. Deal was impaired because he could vote for death only if the defendant would reoffend. J.A. 75. Based on the entire voir dire, Mr. Deal's demeanor, and the lack of an objection from defense counsel, the trial court dismissed Mr. Deal. This decision was not objectively unreasonable.

Brown's future dangerousness argument is wrong for a second reason. Brown claims that the Washington Supreme Court did not correctly set out the law when it stated on voir dire that "[Mr. Deal] indicated he would impose the death penalty where the defendant 'would violate if released.'" Br. Resp't 18. This statement by the Washington Supreme Court is correct. It is not the law in Washington that the only time the death penalty can be imposed is if the defendant will reoffend. Deal's understanding cannot be a correct statement of the law because the only possible penalties for aggravated first degree murder are death or life without parole. Yet Brown assumes that the Washington Supreme Court's statement refers to the mitigating factor of lack of dangerousness.

There is no basis for this assumption. The Washington Supreme Court is the ultimate expositor of state law, and the federal courts may not reexamine a state court determination of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Estelle v. McGuire*, 502 U.S. 62, 67–72 (1991). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 126 S. Ct. 602, 604 (2005). The federal courts must necessarily assume that the Washington Supreme Court knew of, understood, and correctly applied state law in reviewing Brown's claim of error.

In addition, the evidence shows that the Washington Supreme Court was well aware of, understood, and correctly applied state law. The Washington Supreme Court opinion sustaining Mr. Deal's removal also analyzed, in depth, Washington's capital punishment law and the application of the law to Browns' trial. *See* Pet. App. 105a–19a, 184a–200a. As part of this analysis, the Washington Supreme Court specifically discussed the jury's consideration of various factors during the penalty phase, including "whether there is a likelihood the defendant will pose a danger to others in the future. . . ." Pet. App. 192a; *see also* Pet. App. 194a (discussing Brown's proposed jury instruction on future dangerousness). Brown's argument that the Washington Supreme Court somehow forgot that future dangerousness was a proper factor for jurors to consider in the penalty phase lacks merit given the court's lengthy discussion of the state capital punishment law.

In light of the state court factual determinations of substantial impairment, the Washington Supreme Court's decision that Mr. Deal was properly excused from the jury was not an unreasonable application of clearly established federal law. Brown is not entitled to relief under 28 U.S.C. § 2254(d)(1).

3. The State Court Decision That Mr. Deal Was Substantially Impaired Was Not Based On An Unreasonable Determination Of Facts Under § 2254(d)(2)

Brown also seeks relief under 28 U.S.C. § 2254(d)(2). Br. Resp't 19–28. Under § 2254(d)(2), an applicant is entitled to relief if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The "objectively unreasonable" standard in § 2254(d)(2) is demanding. To be an unreasonable determination of the

facts, the evidence must be "too powerful to conclude anything but" the contrary of that reached by the state court. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005). That reasonable minds reviewing the record might disagree about the correct resolution of a factual issue is not sufficient to obtain relief. *Rice v. Collins*, 126 S. Ct. 969, 976 (2006).

Brown is not entitled to relief under § 2254(d)(2). He failed to overcome the presumption of correctness required by § 2254(e)(1). Brown has not proven, by clear and convincing evidence, that the state courts' finding of fact that Mr. Deal was substantially impaired was erroneous. *See supra* p. 5–9. If a state court finding of fact is not erroneous, it cannot be objectively unreasonable. If a state court finding is erroneous, relief is available only under § 2254(d)(2) if the erroneous finding of fact is also objectively unreasonable.

Even if Brown had met his burden under § 2254(e)(1), the state courts' findings are not objectively unreasonable because this case is "on all fours" with *Witt* and *Darden*. In both *Witt* and *Darden*, the trial court made no express finding that the juror was impaired. *Witt*, 469 U.S. at 430; *Darden*, 477 U.S. at 178. Defense counsel did not object to the prosecutor's challenge of the juror. *Witt*, 469 U.S. at 430–31; *Darden*, 477 U.S. at 178. In both cases, this Court gave deference to the trial court's ability to evaluate the demeanor of the juror. *Witt*, 469 U.S. at 425–26; *Darden*, 477 U.S. at 178. The same is true in this case.

Brown attempts to distinguish *Witt* and *Darden* because in "those cases the challenged jurors stated express views that would likely prevent them from following the law." Br. Resp't 21. But the same is true in this case. When asked when the death penalty would be appropriate, the only examples Mr. Deal pointed to were when the defendant would reoffend or when the

defendant wanted the death penalty. J.A. 62, 69, 70. Brown claims that Mr. Deal was not impaired because "Deal never said he could only impose the death penalty if there were proof that the defendant would kill again." Br. Resp't 13. But *Witt* rejected the notion that a juror was only impaired if the juror testified that he or she would automatically vote against the death penalty. According to the Court, the "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424. Rather, "[d]espite this lack of clarity in the printed record . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425–26.

We do not dispute that Mr. Deal also testified that he could follow the law. J.A. 73. However, the determination of substantial impairment is not limited to the juror's expressed profession that he can be fair and follow the law. *Morgan v. Illinois*, 504 U.S. 719, 734 (1992). "*Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquires could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Id.* at 734–35. Even when a juror states he can be fair and impartially follow the law, the judge must still determine whether this protestation is in fact true. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). Whether a juror can impartially follow the law, and in fact whether a juror actually means what he says when he says he can follow the law, is determined by the judge's observations of the juror.[4]

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[4] The National Association of Criminal Defense Lawyers is concerned with the unrestrained exclusion of jurors based upon their beliefs in the death penalty. NACDL Amicus Br. 4–9. That concern is simply not present in this case. Like *Witt*, this case concerns the

Thus the Court must examine the entire voir dire, not just selected questions. In light of the entire voir dire, the deference owed to the trial court judge, and defense counsel's lack of objection, the finding that Mr. Deal was substantially impaired is not objectively unreasonable

4. Conclusion

For the reasons stated herein, the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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exclusion of an individual juror based upon the factual determination that the juror was substantially impaired. Judge Martinez applied the correct standard in order to seat an impartial jury, stating he would excuse a juror only if the juror was substantially impaired. *See, e.g.*, J.A. 7–9 (discussing *Witt* standard); J.A. 26 (granting defense challenge because juror was substantially impaired); J.A. 38–39 (denying prosecution challenge); J.A. 56, 117–18 (finding juror Henderson substantially impaired). Applying the substantial impairment standard, Judge Martinez granted only seven of the prosecution's twelve challenges, and only two of those were granted over a defense objection (Ms. Henderson and Ms. Denis). J.A. 127–37. Of the seven prosecution challenges objected to by defense counsel, Judge Martinez denied five of those because the jurors were not impaired. J.A. 127–37.

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NO. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari Filed Sept. 18, 2006

Certiorari Granted January 12, 2007

Table of Joint Appendix

Description	Page
Relevant Docket Entries	1
Excerpts of Verbatim Report of Proceedings (Colloquy Re: Death Qualification Process), October 28, 1993, *State of Washington v. Brown*, King County Superior Court Cause No. 91-1-03233-1	3
Excerpts of Verbatim Report of Proceedings (Voir Dire Of Juror Osborn, Discussion Re: Objections, And Voir Dire of Juror Obeso), November 1, 1993, *State of Washington v. Brown*, King County Superior Court Cause No. 91-1-03233-1	10
Excerpts of Verbatim Report of Proceedings, November 3, 1993 (Voir Dire Of Jurors Henderson And Deal), *State of Washington v. Brown*, King County Superior Court Cause No. 91-1-03233-1	40
Excerpts of Verbatim Report of Proceedings, November 4, 1993 (Voir Dire Of Juror Denis), *State of Washington v. Brown*, King County Superior Court Cause No. 91-1-03233-1	76

Defendant's Motion to Recall Venire Member or For Mistrial And New Panel, With Memorandum, *State of Washington v. Brown,* King County Superior Court Cause No. 91-1-03233-1 101

Defendant's Motions to Reconsider Rulings Denying Challenges For Cause Against Jurors McKennan And Drake, With Memorandum, *State of Washington v. Brown,* King County Superior Court Cause No. 91-1-03233-1 108

Excerpts of Verbatim Report of Proceedings (Argument And Ruling On Defendant's Motions), November 22, 1993, *State of Washington v. Brown,* King County Superior Court Cause No. 91-1-03233-1 115

Excerpts of Verbatim Report of Proceedings (Statement Re: Prosecutor's Unused Peremptory Challenges), November 29, 1993, *State of Washington v. Brown,* King County Superior Court Cause No. 91-1-03233-1 122

Minutes Entries, *State of Washington v. Brown,* King County Superior Court Cause No. 91-1-03233-1 123

Court's Penalty Phase Instructions to the Jury, *State of Washington v. Brown,* King County Superior Court Cause No. 91-1-03233-1 145

Verdict Form, *State of Washington v. Brown*, King County Superior Court Cause No. 91-1-03233-1 154

Judgment and Sentence, *State of Washington v. Brown*, King County Superior Court Cause No. 91-1-03233-1 155

28 U.S.C.A. § 2254 159

Wash. Rev. Code 10.95.020 163

Wash. Rev. Code 10.95.030 166

Wash. Rev. Code 10.95.060 168

Wash. Rev. Code 10.95.080 170

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

Order and Amended Opinion, *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006) 1a

Judgment In A Civil Case, *Brown v. Lambert*, U.S.D.C. Western District of Washington Cause No. C01-715C 42a

Order, *Brown v. Lambert*, U.S.D.C. Western District of Washington Cause No. C01-715C 43a

Opinion, *State of Washington v. Brown*, Washington State Supreme Court Cause No. 61320-6 ..... 92a

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

01-CV-00715-JCC

Cal Coburn Brown, *petitioner*,

v.

John Lambert, *respondent*.

06/13/2001 – Petition for a writ of habeas corpus filed

06/19/2001 – Order granting stay of execution

11/30/2001 – State court record filed

02/01/2002 – Supplement to state court record filed

07/15/2002 – Amended petition for a writ of habeas corpus filed

09/13/2002 – Answer to amended petition filed

09/16/2004 – Judgment and Order of U.S. District Court denying habeas corpus petition

09/22/2004 – Notice of appeal filed by Brown

11/05/2004 – Order granting in part certificate of appealability

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

04-35998

Cal Coburn Brown, *appellant*,

v.

John Lambert, *appellee*.

12/08/2005 – Opinion of Ninth Circuit, reversing in part, and granting petition for a writ of habeas corpus as to sentence of death

12/20/2005 – Petition for rehearing *en banc*

06/19/2006 – Order and Amended Opinion of Ninth Circuit, denying petition for rehearing *en banc*; dissent from denial of rehearing *en banc*

06/27/2006 – Order staying issuance of the mandate pending the filing of a petition for a writ of certiorari

FILED

94 MAR 7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

OCTOBER 28, 1993

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THE COURT: All right. Counsel, this is an area where there is great concern from my aspect. The voir dire process, even in a capital case, is within the discretion of the Court. Certainly in a case like this where there is so much at stake, I am willing to give counsel as much opportunity as possible to ask questions of the prospective jurors so you can intelligently use your peremptory challenges and find those challenges for cause.

If any of you have ever tried a case in a Federal courtroom, you wouldn't be asking any questions. They'd all be done from here, and I think that process can actually be done from here too in

[24]

state court and still withhold any appellate scrutiny.

The questions that were asked yesterday from both sides were way beyond what should be allowed in any particular case. You cannot ask questions of the jurors that would get them to commit in any way. You cannot ask questions of them that would indicate, as we have already discussed, you know, "Do you understand this would mean die in prison," because that's not technically correct.

You cannot ask them, "What do you think would be appropriate mitigating factors?" You can ask them if they would be willing to consider mitigating factors and perhaps point some of them out. Some of those things that you saw yesterday was a perfect example. A lot of these people, most of them are working in a total vacuum. There were some great responses given by some of the jurors in terms of the death penalty. I forget the woman's name yesterday, but she kept saying that, you know, when this doesn't really touch your life, you don't think much of it, and that is the point that's being made by both sides.

That has to be explored with each individual juror, but when you ask them in that vacuum about

[25]

something that doesn't touch their lives and you ask them to come up with specific instances where they would or would not do something, you're going to get the same exact response you got even with that intelligent juror yesterday, nothing, and that's not going to lead to any kind of information that either side can use from this particular juror or this particular panel as to what they might ultimately do.

The real issue here is to seat a jury that is comprised of individuals who can follow the law, consider all factors before making up their minds, and certainly that has to be done within the context of this particular case, within the context of the facts of this case.

The questions that are to be asked of them are to be designed to discover whether individual jurors would automatically impose either one penalty or another and certainly have some leeway to follow up on that and put it in a context that they can understand that makes sense from what you know of the facts of this particular case. But to sit there and flesh it all out and ask them, "Well, if you found one aggravating circumstance, would that change your opinion? How about if two? How about if three? How about if four? How about if five?" And are not only

[26]

improper, but a total waste of time.

I think if you can talk about extremes, you can ask them, think of the most extreme case you could think of, would you say that in that particular case, in a Ted Bundy or Jeffrey Dahmer or something like that, would you just automatically impose -- would you not even consider this other option? That's what these sorts of questions are designed to do, and then place the facts of this case within that particular context.

Counsel, we gave an assurance, in effect, to the jury panel that was called here that this case would take about six weeks. We are looking at a timeframe where that will put us very, very close to

the Christmas holidays and the Christmas breaks and stuff. A lot of these people that have indicated they can stay may very well have problems if we go seven weeks, seven and a half weeks.

At the speed that we're going, if counsel insist on going into it in this particular depth, it is going to take us three and a half weeks for jury selection, period. We are not going to be able to get the case done in time.

Yesterday was a trial, a shakedown. I saw what it was like. Today I'm expecting you to move a lot

[27]

faster. I think 15 to 20 minutes is more than necessary for both sides to be able to explore, absent some unusual response from a particular juror. I'm going to allow you some leeway today, both sides. I want you to consider the Court's comments. You all know exactly how to do it in this particular arena, and I understand that it may be new in terms of dealing with these kinds of issues with a lot of these jurors and that that will take some time, but if we are as slow as we were yesterday in dealing with some of these people, then tomorrow the Court is going to handle it differently and I'm going to do a major portion of the voir dire and allow counsel a very limited time to follow up on any specific responses the jurors may have, because that's the only way I can think of keeping this whole thing on time.

MR. CLEVEN: Your Honor, at least one matter I'd like to bring up. The Court's remarks seem to be calculated or addressed only to people

who would automatically impose one penalty or another I believe was what the Court just said. It is our position of course that that is a correct statement of the death qualification process.

It is our position that Witt has not been fully

[28]

incorporated as a matter of state law and that Witherspoon is the only mandatory test. However, in the reverse aspect, Morgan does impose an Eighth Amendment requirement on these proceedings, and Morgan does adopt a reverse Witt and calls for the exclusion for cause of jurors who would be substantially impaired in their ability to consider the alternative sentence of life.

The Court's remarks just now are the closest thing we've heard to a ruling in this regard, and I think all parties would be interested to know what the Court's position is in those regards. Are we entitled to challenges for cause of jurors who would be substantially impaired in either regard, death qualification or life qualification, or is the Court limiting this to all jurors?

THE COURT: Counsel, the dialogue that took place with Ms. Bohinski yesterday I believe, the one juror who was excused for cause, is probably the best example I could think of as a juror who was substantially impaired in being able to consider those options one way or the other. She in answer to questions from both sides vacillated back and forth. I was satisfied there was a substantial impairment there and made the decision to go ahead and excuse

[29]

her.

The direct response to your question is certainly you can look to questions that are designed to bring up whether one would automatically impose one or the other or not consider one or the other, attitudes, biases, prejudices, thoughts that would substantially impair them from going one way or another. I'm just trying to limit it.

MR. CLEVEN: So it is the Court's ruling as well then that the State is entitled to exclude pursuant to Witt in addition to excluding pursuant to Witherspoon?

THE COURT: Does the State have a position?

MS. FRICKE: Yes, your Honor. I think that counsel is overlooking State vs. Hughes where the Washington Supreme Court citing to Witt applied the substantial impairment test.

Also the Court should consider that counsel hasn't made any kind of motion under the State vs. Hughes case to try and get this Court to somehow deviate from Hughes, and this Court should follow the law that has been set out from the United States Supreme Court and the Washington Supreme Court and use the substantial impairment test on both sides of the coin.

[30]

THE COURT: That is my understanding, counsel, and that's the way this Court has been proceeding all along.

MR. CLEVEN: We had briefed it otherwise, your Honor, and it is our position that Hughes did not serve to adopt Witt. It made reference to Witt,

but it was not clearly an application of the Witt standard.

It is our position that that has not been squarely faced by any Court in this state as of yet, and of course the United States Supreme Court decisions in Witherspoon and Witt are not mandatory. They are merely permissive. They permit the states to allow certain sorts of excuses for cause. They do not require them in any instance.

THE COURT: Counsel, my objective is to get a jury seated here that would be willing to consider both options equally and fairly. If that means that the State can make a motion to excuse someone for cause because they would be substantially impaired from imposing the death penalty, this Court will certainly consider that in looking at whether or not to excuse a particular individual, but I think the only fair way to do it from my reading of the law is to allow both sides to be able to make those

[31]

particular challenges for cause and the Court can make specific rulings.

Are we ready for our first juror?

MR. MATTHEWS: Yes, your Honor.

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FILED

94 MAY 20

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 1, 1993

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[42]

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THE COURT: Mr. Osborn, as I told all of you this morning, the attorneys have thier first opportunity to follow up on some of the questions. Some of these questions that are asked are convoluted and are difficult to answer at best even when grammatically correct. Please do your best. If you do not understand the question, ask them to clarify it, ask them to restate it perhaps in a different way. There are no right or wrong answers. All we are trying to do is ascertain a little bit about you, your background, your feelings about some of these issues that counsel are going to discuss.

All right. The State.

VOIR DIRE EXAMINATION

BY MS. FRICKE:

Q Good morning, Mr. Osborn. I am Theresa Fricke, and I am one of the prosecutors in this case.

First, I'd like to go back a few days and sort of try and recall with you some of the instructions that Judge Martinez gave to the jury when you first were here a few days ago. I

[43]

just want to make sure that the legal sort of framework is in place when discussing the death penalty as a possible penalty.

First, do you understand from the Judge's previous instructions that the defendant is charged with a premeditated murder?

A Yes.

Q And that in addition to the charge of premeditate murder, there are certain aggravating factors that are also charged. Do you understand that?

A Yes.

Q Okay. So, the State in proving the case to the jury would be required to prove a premeditated murder and also at least one of those aggravating factors. Do you understand that?

A Yes.

Q And was it also clear that there may be a second phase of the case, in other words, this case could have essentially two prongs?

A Yes.

[44]

Q Now, in the second phase of the case, the jury would be looking at punishment only. Did you understand that?

A Yes.

Q Now, the other thing that the Judge explained was that the State would be required to prove the crime, the aggravating factors and, if we got to a penalty phase, we would have to prove to you that a death sentence is the appropriate sentence beyond a reasonable doubt, in other words, that standard of proof goes throughout the entire case. Do you understand that?

A (Nodding head).

Q The other thing that goes throughout the entire case is a presumption of in favor of the defendant. In the first phase of the case, the part where you are looking at premeditated murder and the aggravating factors, the defendant is presumed innocent. Do you understood that from the instructions?

A (Nodding head).

Q In the penalty phase if we got to the penalty phase in this case, there is the presumption of leniency, in other words, the jury would presume that a life without parole sentence should be imposed unless the State proves

otherwise to you beyond a reasonable doubt. Do you understand that?

A Yes.

[45]

Q Now, the first question I have for you is, when you heard about this case on the very first day here in court a few days ago and the Judge mentioned that it could possible be a death penalty case, what was your reaction?

A My reaction was that I would have to look at everything very carefully to make a decision on something like this.

Q Did you have any particular concerns about your own feelings about the death penalty?

A No.

Q Have you thought about it since that day?

A Yes.

Q Can you share with us some of your thoughts about the death penalty?

A Well, I think it's permanent.

Q Pardon me?

A I think it is permanent, but I wouldn't, I really am ambiguous on that. It depends on the circumstances and what the crime was. There's a lot of factors that have to be taken into consideration.

Q I think that you mentioned when the Judge asked earlier that you had heard something about this case in the press?

[46]

A Yes, sometime back I had read in the paper where they had found a body in the trunk of a car at SeaTac, and that was all that I remember about it. I didn't remember anything else except they were looking for someone that they thought left from the airport. And then a couple of weeks back I read in the paper, or I actually heard it on the radio that they were impaneling a jury for this case. I thought, well, I don't have to be down there until the 27th so I will not be involved in that, but here I am. That's my only recollections of this case.

Q Now, the media reports, did those have any influence on you? Do think that is something that would interfere with your ability to hear this case?

A No, I didn't read, I just read the fact that they were, there had been a body found out at SeaTac. And I also heard on the radio that they were impaneling a jury. I didn't associate those two because that was quite sometime back when they found the body. It wasn't current news.

Q Do you think that you could separate what you heard in the newspapers or radio or television

[47]

and separate that from your thinking about this case and you would be able to just concentrate on what you are hearing in court?

A Yes.

Q Thanks.

We talked a little bit about the State's burden of proving the case beyond a reasonable doubt.

Now, the fact that there is potentially a penalty phase and potentially a death sentence decision that has to be made by the jury, do you think that you would hold the State to a higher burden of proof as would prove the guilt phase of the case? In other words, knowing that you might have to decide on yes or no on the death penalty, do you think you might hold us to a higher standard in the part of the case where you just determine guilt or innocence?

A Yes, I probably would. You would have to really prove it.

Q Okay. Now, the proof beyond a reasonable doubt is a standard that sometimes folks are not real familiar with until they are part of a jury. Sometimes I hear people say, well, I want proof

[48]

beyond any doubt, any doubt whatsoever. Is that what you are talking about?

A Yes.

Q You would expect us to prove the case beyond any doubt?

A (Nodding head).

Q Let me ask you then also in the penalty phase of this case, if we did prove to you beyond a

reasonable doubt and the jury decided that this man was guilty of murder in the first degree, premeditated, and at least one aggravating factors, and then you found yourself in the penalty phase of the case, would you hold the State to a higher burden in that phase of the case as well?

A Not if he had been found guilty.

Q In the penalty phase, do you think that the fact the a death sentence is possible that that would cause you to have concern about your ability to be fair and hear both sides of the case?

A No.

Q I'd like to show you the jury instruction that comes about with the penalty phase where the jurors have in mind the crime of which the defendant has already been convicted.

[49]

Now, the jury considers mitigating factors that could come up at any time during trial. Whatever mitigating factors are present, the jury considers those and decides whether the State has proved beyond a reasonable doubt that there are not sufficient mitigating factors to merit leniency.

Would you be able to make that determination and be able to consider mitigating factors?

A I believe so.

Q Just to clarify one thing, in the penalty phase when we are talking about the mitigating factors, again, the State first must prove in the penalty phase is beyond a reasonable doubt just like it is in the guilty phase. Would you hold the State to prove beyond all doubt that there are not sufficient mitigating factors to merit leniency, or would you use the beyond a reasonable doubt standard?

A Reasonable doubt.

Q So, you would think that the standard might be not as great in your mind in the penalty phase as it was in the guilt phase?

A Yes.

[50]

Q Why is that?

A Well, if he had been found guilty and it is murder in the first degree, there would be no question in my mind to find him guilty for the penalty.

Q And then you could explain why that would be a different decision making in the guilt phase, why you would feel you would need more proof in the guilt phase?

A I don't believe I said that.

Q Oh, okay. Maybe then you could clarify that for me?

A Well, it is just like if the party has been found guilty of murder in the first degree, there would be no problem finding him, going for the death penalty.

Q And in that situation you would be able to hold the State to its burden of proof beyond a reasonable doubt.

A Yes.

Q And then when we were discussing the guilt phase of the case, when I was talking about beyond a reasonable doubt standard, perhaps I misunderstood. I thought that what you told me was at that point you wanted to have the State

[51]

prove beyond all doubt?

A Beyond a reasonable doubt.

Q Okay. Do you believe then that you could follow the law in the guilt phase of the case?

A Yes.

Q And hold the State to its burden beyond a reasonable doubt?

A Yes.

Q So, would you then be influenced by the fact that there is a potential death penalty?

A No.

Q Thank you, sir.

MS. FRICKE: No further questions, Judge.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Good morning. My name is Lin-Marie Hupp. I am one of Mr. Brown's attorneys. I am going to ask you a few more questions about this. Usually one of the first things I'd like to know is, is it confusing to you at all, the fact that we're asking about what you would do in the possible sentencing phase before we have even started the trial and you haven't heard any evidence at all?

[52]

A I can see where you're headed.

Q So, we end up asking all these questions about what if you found him guilty and you understand why we're doing that?

A Yes.

Q And I guess before I ask you about your feelings about the death penalty, I just want to ask you a couple more follow-up questions about what you did hear.

What you remember, what I'm hearing is what you remember is an article that you read in the paper a really long time ago and then you heard something on the radio like within the last month or so?

A Yes.

Q I think, well --

A And I don't even remember any names --.

Q Okay?

A -- in this. I just remember that there was a body found in a trunk of a car at the airport,

and the police were looking for someone who had done it. Names, I don't remember. I also don't remember the name on, when I heard it on the radio the other day that they were selecting a jury.

[53]

Q And you are sure that it was this case. Is that partly because it was a death penalty case?

A No, no. I had no idea it was this, if they were even, if they had captured the person that they were looking for.

Q I notice in your questionaire that you had taken the time to write in a letter to a magazine when they had made errors in their articles, I mean, you mentioned that you had done that with like aircraft magazines?

A Yes. I was in the aircraft business all my life. They call it nit-picking.

Q You wouldn't be surprise to hear that sometimes the news, the radio or the newspapers get details wrong?

A I don't believe anything I read in print in the newspaper.

Q You could be able to put aside anything, you say you remember the detail in the paper, you would be able to put it aside and decide basically on what you have heard in court?

A Well, let's talk about this. The letters I have written to aircraft magazines, they show a picture of an airplane sitting there and the caption is not for that aircraft. I would write

[54]

to them and say get your proof readers on the stick here.

Q Okay. And you wouldn't be shocked to heard sometimes that happens with crime stories in our local press?

A Oh, yes, I have no doubt.

Q Okay. Now, I am going to start talking about the death penalty. One of the things that you said, I think, and correct me if I'm wrong, is that if somebody has been proved and you are really sure that they're guilty of murder in the first degree, that the death penalty would be an appropriate penalty?

A Would be an appropriate penalty, yes.

Q First, I have got a couple of questions about that. First of all, what does murder in the first degree mean to you? We have a lot of stuff that we've talked about as to what that means.

A To me it means something that was premeditated, planned this, they had entered into a program to deliberately take this person's life.

Q Okay. And in that case, the death penalty would be a more appropriate penalty in your own personal opinion. Do you have any of sort

[55]

feeling that there is no other appropriate penalty for it?

A Not to premeditated.

Q How about this case involves, we don't even get to the question I'm talking about, the possible death penalty, unless we decide premeditated murder yet the State also proves beyond a reasonable doubt at least one of four aggravators that they charged. They are going to present evidence and try and convince you beyond a reasonable doubt that this murder was committed during a rape, a robbery, a kidnapping and in order to eliminate a witness.

First of all, do you understand generally what that charge is? Do you have any questions about what the charge is?

A Well, you just explained what the charge was.

Q Sometimes I don't know if I'm making sense or not, and I have been going over this often enough that sometimes I mix things up. Does that make sense?

A Yes.

Q Before you get to a penalty phase, before you get to the point where the jury is going to decide on the death penalty, the jury has to be

[56]

convinced beyond a reasonable doubt of premeditated murder and at least one or maybe all of those aggravating circumstances?

A Yes.

Q In that circumstance, if you were sitting on a jury and you found beyond a reasonable doubt

that a person committed premeditated murder and that it was committed either during a rape, a robbery, a kidnapping or in order to eliminate a witness, then do you think there is any penalty other than the death penalty that's appropriate?

A No.

Q Why is it that you feel that way?

A I guess it's the way I was brought up, and eye for an eye, a tooth for a tooth.

Q And I want to reassure you that there is no right or wrong answers here. What we're asking for is what your giving us, is honesty about your moral feelings.

And eye for an eye, a tooth for a tooth, and that is in the case where there is premeditated murder and at least one of the aggravating circumstances?

A Yes.

Q In that circumstance, do you think that you

[57]

could seriously consider any penalty other than the death penalty?

A No.

Q Do you think that you would be open to listening to any kind of arguments that are against the dealth penalty?

A Listen to the arguments.

Q You would listen to the arguments, but in reality you think you would be for the death penalty all the way?

A If the person was found guilty.

Q Okay. And part of what I was hearing from the start of your, from when you were talking to Ms. Fricke was, even if you found beyond a reasonable doubt that you might not impose the death penalty if you had some sort of lingering doubt as to the person's guilt?

A If I have that doubt, yes.

Q But that is the only kind of thing in that instance that would stop you from imposing the death penalty; is that right?

A (Nodding head).

Q That's right? I'm sorry.

A Yes.

MS. HUPP: I don't have any further

[58]

questions.

THE COURT: Mr. Osborn, I will have you step back in the juryroom. The bailiff should be able to excuse you from there in a few minutes. We will tell you whether we get ahold of you in the future and how we go about that. Thank you for your responses.

(Prospective juror left the courtroom.)

THE COURT: Actually, I think he evened it out by making you prove it, really, really prove it and then we he would not consider anything else, right?

MS. HUPP: I think we will count him out on a number of different bases, your Honor.

THE COURT: Challenges?

MS. HUPP: From the defense, definitely.

MR. FRICKE: Your Honor, I think this jury reversed himself twice. I really didn't draw a conclusion based on what this person said.

MR. MULLIGAN: Your Honor, I think he only reversed himself when he was let out and was really clear of what his own feelings are,

[59]

an eye for an eye, a tooth for a tooth, there wouldn't be any other appropriate penalty and that was the way he was raised.

MS. HUPP: And I also think he was very clear in distinguishing between just premeditated murder and then when we talked about aggravating circumstances, he was willing to think about another sentence if it was just premeditated murder, but in addition had decided the person was guilty beyond a reasonable doubt of also an aggravating circumstances, then there really was not an alternate.

MR. FRICKE: I don't think I heard that just because I explained all that to him incredibly carefully in the beginning. I think the only way to clear it up is if the Court would make the inquiry. I think he was just being kind of trying to please both sides or something because he just reversed himself like a whipsaw. I think maybe if the Judge would ask him questions, maybe we could clear this up.

MR. MULLIGAN: Your honor, when the question is his own views substantially impares the ability to consider the sentence of life, when he is not being asked questions when he

[60]

said very directly that if it is premeditated murder with an aggravating circumstance, it would be the death penalty, and then he goes to the eye for an eye, a tooth for a tooth in response to a defense question, it's had for me to imagine how you could think he was trying to please us by saying that.

THE COURT: And then when he said it was just the way I was raised, I mean, it seems to imply that his feelings are fairly well set.

Counsel, I'm going to go head and excuse Mr. Osborn. Let met point something out to both sides. If you are going to agree on a challenge, then there is no, we can shortcut some of what happens out here. If there really is a serious question about whether or not someone is confused about what is happening out here, I don't mind at all stepping in and trying to clarify it from my prospective and giving them perhaps a bit more instruction and asking for responses.

I thought at first the both of you were wanting to excuse Mr. Osborn since he seemed kind of confused to both sides, but if there really is a question, let me know and I

[61]

don't have any hesitation about bringing the juror out here and following up questions done by the court.

MR. MATTHEWS: Quite honestly, in this case, your Honor, I don't think either one of us felt so strongly about excusing him for what he said about the guilt phase. The standard of proof didn't worry us. I did feel he was a little confused. He did go back and forth. So, if you want to excuse this person, that would be fine. How do we telegraph the Court that we would like the Court to ask some questions?

THE COURT: I don't mind sending him back there and, actually, if either one of you, either side wants to say would the Court care to clarify or ask questions, I will jump right in there.

What I was thinking of watching the last three people or so, is there has got to be a better way, there has got to be a different way to begin, maybe make it more visual. Think about it during the lunch hour. I have got my clerk thinking or working on the possibility here in terms of other ways of presenting it to them. Perhaps a chart could be put up on an

[62]

esel, something that would show them in terms of phase one, phase two, presumption of innocence, presumption of leniency, that sort of thing so they could visualize it rather than just listening to the very difficult grammatically incorrect questions that are asked in this area. Think about it.

Bring out the next one. Tell Mr. Osborn the Court has excused him for cause, or just excused him. We don't need him back.

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[200]

(Prospective Juror, Victor A. Obeso, entered the courtroom.)

THE COURT: How are you?

MR. OBESO: Fine, thank you.

THE COURT: How do you pronounce your last name?

MR. OBESO: Obeso.

THE COURT: All right. Mr. Obeso, thank you for coming out here. I know it is late. Thank you for your patience. Counsel are going to follow up on some questions that they asked before. We'll start with the defense.

VOIR DIRE EXAMINATION

BY MR. MULLIGAN:

Q Good afternoon, sir. My name is Terry Mulligan. I have just got a few questions for you.

Could you tell me a little bit more about what all you remember reading or hearing

[201]

about this case in the press?

A Not very much really. Essentially, the facts that the Judge told us earlier. I recall that there was a body discovered in a trunk at the SeaTac Airport. And I don't recall whether it was before that or after that, that alleged California. Very basic. I'm not sure if it's correct or not.

Q Do you remember any other specifics about Mr. Brown that may have been included in those articles or allegations about his past?

A I don't. I did recall his name very clearly the other day when I was here, which tells me I read the article. I don't recall.

Q And you sort of threw on there that you're not even sure if they are true. You understand that, particularly in sort of high profile cases like this, that what you read in the paper may not even be close to the true?

A I'm very clear on that, yes.

Q So, if you assure both sides, then, that whatever you read is not going to effect you even if during the course of the trial something comes up and jogs your memory about something else you read in the newspapers, you would be

[202]

able to put that out of your mind?

A Yes, I would.

Q Do you consider, let me ask you this. When you heard the Judge, when you were in here the very first day, he mentioned the death penalty. What was the first thing that went through your mind?

A Well, my heart kind of sunk that it was a case in which the loss of life would have to be discussed, dealt with.

Q When you say your heart sunk because you knew as a juror that is the kind that you

might have to discuss and deal with, do you still think that, although, I'm sure that you may be tough but it's something you can handle?

A Yes, I believe I can handle it.

Q Would you consider yourself I guess a law abiding citizen for the most part?

A Yes, I do.

Q Would you get some instruction of the law from Judge Martinez and go back into the juryroom and just likely ignore that and, in essence, break the law?

A No, I would not.

Q Would your decision, and looking again at the chart that the Court has given you, do you

[203]

understand that if the State proves beyond a reasonable doubt and all twelve jurors say Mr. Brown is guilty of premeditated murder with at least one aggravating factor, that that same jury is going to have to decide whether to impose a sentence of life without parole or the death penalty?

A Yes, I understand.

Q Do you think you could go into a juryroom and fairly consider both of those alternatives?

A Yes, I believe I could.

Q Do you think that there is any type of a case, whether in terms of a murder case, first degree murder with aggravating factor, do you

think there is any way your decision as to which penalty should be imposed would be automatic going either way? In one case you would say I'm am going to vote for the death penalty no matter what the law says, no matter what other evidence they give me, no matter what the other jurors say or vice versa, the life sentence?

A I don't believe I would do that in either case.

Q Are your feelings about the death penalty so strong that you wouldn't be able to give serious, very serious consideration to both of

[204]

those alternatives? Are they so strong that you would lean so heavily against one or so heavily against the other that you couldn't give very serious consideration to both of them?

A I would give serious consideration to both based on the instructions.

MR. MULLIGAN: I have no further questions.

THE COURT: Thank you. State.

VOIR DIRE EXAMINATION

BY MS. FRICKE:

Q Good afternoon, Mr. Obeso. I'm Teresa Fricke. I'm one of the prosecutor's in the case. When you heard that this was going to potentially be a case where the death sentence would have to be decided upon, did you have a chance to reflect on your own feelings about the death penalty?

A Well, as I said, initially I had kind of a sinking in my heart feeling. I thought about it some more, and I filled out the questionaire.

Q Have you had a chance to think about it between the time you filled out the questionaire and today?

A Yes.

[205]

Q What kind of things were going through your mind as far as any concerns you might have about deciding the death sentence?

A I don't know any place that this concerns, but just trying to fit what my views are, or if it's something I've given thought in the past but never had to consider in front of me. Obviously, this is a different situation. Just kind of rethink why.

Q Can you share with us a little bit about the things that went through your mind?

A Well, I believe I answered on the questionaire that I thought that the death penalty was poor public policy. I think that historically the harsher the penalty, it disproportionately has been applied to people of color. I believe that that's called the inherent bias to our system but I believe it's there. I don't, there are a number of different reasons for bias in society for the the death penalty, for a deterent, for retribution.

Q What do you think about those, do you agree with them?

A I don't know that I, I don't think that I believe that the taking of a life is justified.

[206]

But I do believe in society agreeing as a whole as to what rules we live by. That would be one of our rules. We have a death penalty.

So, I don't think I thought through exactly what all my feelings were about it, but I do think it is there for a reason, and that if faced with having to make a decision about that law, that I would look at what the law is, what the instructions are about the law and apply those.

Q So, that you, however, don't think it is appropriate to take a life? Would you explain that a little further?

A Well, I guess I am not quite comfortable with society deciding that because someone has taken a life that, therefore, this society should take that person's life.

Q What do you think is your source? I'm sure there are other people that feel that way, but what is your personal reason for why you feel that way?

A If it's a member of society, it feels like I'm making part of that choice to take that life. If faced with it individually, I wouldn't do that.

[207]

Q Is that something that during the course of your life you have always felt that way or has there been a time in your life when you felt the

death penalty was an appropriate punishment?

A I don't think I have given it a lot of thought over the course of my life. I don't recall when I was ever, felt the death penalty was the correct, right thing to do.

Q Now, in the event that there was a guilt verdict in this case and the jury came back and found the defendant guilty of murder in the first degree premeditating with one or more of the aggravating factors in the guilt phase and, so, then the jury finds itself deciding the penalty phase and whether the appropriate punishment is life without parole or the death penalty, would you have some concerns, some feelings of your own about whether you could vote for a death sentence?

A I believe that I could based upon what the law is, what instructions are given to me, what the facts are as I understand them to the jury. So, I feel that if I participated in a decision that the defendant was guilty, then I would then wait for my instructions on the penalty phase and

[208]

make a determination not from preconceived notions.

Q Do you feel that in deciding the penalty that because of your personal feelings about the death penalty, do you think that you would have trouble being fair to the State's position in that phase of the case?

A I don't feel that I would have any trouble, no.

Q As far as the guilt phase of the case, going back to the part where we're talking about the guilt or innocence of the crime charged, murder in the first degree premeditated as well as the aggravating factor, the standard of proof that the State needs to convince the jury is beyond a reasonable doubt.

Now, given that we're dealing with the death sentence as a possible punishment in the penalty phase, do you think you would hold the State to a higher burden of proof, in other words, in the guilt phase of the case, would you want to know beyond all doubt that the defendant was guilty?

A No, I believe I could fairly decide reasonable doubt as reasonable as defined for me. Yes. A word can mean a lot of different things to a lot

[209]

of different people.

Q Yes. And that is one of the reasons why I wanted to make this real clear is that if you do have some concerns about the death penalty as a punishment, whether that would cause you to expect more from the State in terms of proof, whether you would want beyond all doubt as opposed to beyond a reasonable doubt?

A No, I don't believe I would apply that standard.

Q Likewise for the penalty phase, again, the beyond a reasonable doubt standard is the one

that applies. Would you be able to follow that standard as well?

A Yes.

Q In the event that a death sentence was rendered in this case by the jury, would you have any trouble talking about that with anybody that you know afterwards, explaining what your position was?

A As of now I would say, no. After being through it I'm not certain what I would feel at that point ,but I believe I will be able to talk about it and would want to find people close to me to talk about it.

Q As far as the, again, the decision on whether to

[210]

impose a death sentence, it's a lot different than us talking about it here and discussing it between counsel and the Court and with you here versus when you're actually in a situation however many days from now making the decision.

Do you think that there would be any concerns of a moral or personal nature that would hamper your ability to make that decision? I'm sorry to keep pressing you on this, but it is critical that the State get this fairly clear.

A No, I don't believe it would be.

MS. FRICKE: No further questions.

THE COURT: Mr. Obeso, let me have you step back into the juryroom, and the bailiff will excuse you in just a few minutes. Thank you.

Any challenge on Mr. Obeso?

MR. MATTHEWS: The only problem I had is at one point he said he didn't believe taking a life was justified, I think that was an exact quote, when he was taking about the death penalty itself. And because of that quote we would certainly argue that it certainly would make it extremely difficult for him to vote in favor of a death penalty. That he seemed to

[211]

speak very strongly of moral convictions, and it would appear, I would certainly suggest to the Court, that it is going to be very difficult for him to set them aside especially in light of that particular statement. He doesn't believe taking a life is justified.

THE COURT: Challenge for cause?

MR. MATTHEWS: I'm sorry.

THE COURT: You are challenging for cause?

MR. MATTHEWS: Yes, sir.

THE COURT: Defense.

MR. MULLIGAN: Your Honor, we would object to the challenge of cause. I don't think this individual came close to the level of feeling or emotion that other jurors have been excused for cause on.

I think one of the things that importantly distinguishes him from some other situation is that

he not only in each and every occasion where he was asked a question in terms of following the law indicated that he would follow the law but he could actually verbalize why, why he could and came up with his own in doing it. He said this is a society, and a

[212]

society has to have laws and there are the laws that we have to abide by.

And I think of significance also is the showing that he actually would be able to give serious consideration and would not be impaired by any personal belief with the question about having to talk to someone after imposing the death penalty. I think the suggestion was being made and perhaps given his views that he wouldn't be able to face other people if he returned a death verdict and his response was quite the opposite. In fact, he said if I did impose a death verdict, I would want to go to people close to me and talk to them about it. I think that shows a real willingness on his part to consider it and understand that he would not be impaired to give serious consideration to both sides.

THE COURT: Counsel, once again, we are dealing with very real people with real feelings about a subject that is very difficult for everybody to express their feelings about. I think that there is no question that Mr. Obeso has given it substantial thought. And in response to direct questions about whether or

[213]

not he could follow the instructions and consider both sentences he said he could, and I believe that he can. Motion for challenge denied.

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FILED

94 MAY 20

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 3, 1993

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[85]

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All right. Let's bring in Mrs. Henderson.

(Prospective Juror, Kristin A. Henderson, entered the court room.)

THE COURT: Good morning, Ms. Henderson. Anywhere in the middle of the front row would be fine. I know it may be a little unusual for you looking back this way rather than out that way.

MRS. HENDERSON: That is right.

THE COURT: Is Judge Garner going to be able to get along without you?

MRS. HENDERSON: Probably barely but he will be able to.

THE COURT: All right. You heard what we talk about this morning a little bit?

MRS. HENDERSON: Yes, I'm one of the ones that heard about the case beforehand.

THE COURT: So, I guess the first thing we need to ask you about is, what do you remember hearing?

MRS. HENDERSON: Let's see, I remember I guess about the time that the crime occurred hearing that a woman had been, I guess,

[86]

kidnapped at SeaTac or near SeaTac. And then I don't remember what you said earlier today about her having been discovered in the trunk of a car. I remember that rape and torture were involved.

THE COURT: This is all from like three years ago?

MRS. HENDERSON: I don't know. I mean, it's just there. I don't know when I remember it from but, you know, contemporary with the events. I would not be able to tell you what happened.

THE COURT: All right. You work for the court system. You realize how awfully important it is for decisions to be bases on evidence produced in court and not on reports that fly out through the media?

MRS. HENDERSON: Yes.

THE COURT: Would you be able to assure us and counsel and Mr. Brown that you could disregard everything else you have heard on the outside.

MRS. HENDERSON: Yes.

THE COURT: And base your decision simply on what you hear in the courtroom?

[87]

MRS. HENDERSON: Yes.

THE COURT: All right. I believe we start with the defense.

VOIR DIRE EXAMINATION

BY MR. CLEVEN:

Q Good morning, Ms. Henderson.

A Good morning.

Q My name is Kern Cleven. I'm one of the three defense attorneys for Mr. Brown. We have a third who was called away briefly this morning. I hope you don't take any offense at that?

A No.

Q We do have, were you in your career as a lawyer, have you been a litigator at all?

A Yes.

Q Have you been in the situation of jury selection?

A Actually not jury selection, no.

Q Have you had a chance to observe that in your work with the courts?

A No, actually, I haven't.

Q So, I would not be out of place if I explained a little bit of the procedure to you?

A No.

[88]

Q As the Judge explained, we have a two-phase proceeding, or potentially a two-phase proceeding depending on the outcome of the first phase. And I assume that is a concept you're familiar with?

A Correct.

Q And right now our voir dire here at the front end has to be geared towards that final phase if we get there and make sure we have got all our basis covered.

The first phase, the guilt phase, would be pretty much like any criminal trial. The Defendant is presumed innocent and the burden is on the State beyond a reasonable doubt. The charges of premeditated murder with the aggravating factors alleged of that the murder was committed in connection with kidnapping, rape, a robbery and in order to eliminate a witness to cover up a crime.

If Mr. Brown were found not guilty, of course, the jury's duty would be over. If he were to be found guilty of only some lesser offense or only none of the aggravating factors were found, again, the jury's duty would be done with and any further proceedings would be

[89]

handled by the court.

It is only if Mr. Brown is convicted of premeditated first degree murder and at least one if not all of those aggravating factors are proven to the jury that we get to the second penalty phase. And that has an analogous structure and then it begins with a presumption of a life sentence, a sentence of life without possibility of release or parole, a true life sentence, or the alternative being the death penalty. And in order to get to the death penalty, the State has to, again, prove beyond a reasonable doubt that the mitigating circumstances, or there are not sufficient mitigating circumstances to merit the leniency of a life sentence.

Are you comfortable with that conceptual structure now?

A Yes.

Q You have worked in this system I know for a awhile now and in the Pacific as well?

A Right.

Q What was the nature of the work you did there?

A I was an assistant attorney general for the government of a small country called the

[90]

Federated States of Myconasia.

Q Did you ever have any position with any criminal issues there?

A Oh, a little bit. Our office prosecuted what we called natural crimes, certain crimes where I

suppose the analogy is that they were federal crimes. Our office dealt with those but I wasn't a litigator there. So, basically, my role was, my active role was pretty limited to stepping in when somebody was absent of course.

MR. MATTHEWS: Your Honor, could we take a break for a minute.

(Pause in proceedings.)

THE COURT: All right.

Q (BY MR. CLEVEN) He just wanted to let the other juror leave.

A Oh, okay. As I was saying, my role would have been limited to stepping in in the event of somebody who was handling a case who was absent. And, of course, I would talk about things with other attorneys but I never tried a criminal case there.

Q You were involved in enforcement activity, law enforcement activities of a sort?

A I suppose you would say that but my day-to-day

[91]

activities were very seldom that. But I would, if everybody else in my office were off the island, that was the expression, I was the chief law enforcement officer for this small country. So, yes, in some sense I was.

Q All right. The reason, and you sometimes had to in your activities as a judicial clerk, you

have to enforce the Court's decisions about various matters or enforce various court rules?

A I don't know that I would say that I, I necessarily enforced them. I might allert the judge to something that needs to be enforced. I suppose I would enforce them to the extent that I would step between ex parte contacts between the judge, between some person and the judge, so I suppose you could call that enforcing rules.

Q If you're not actually enforcing the rules, you're at least operating within the structure of set of rules. It's very definite.

A Right.

Q But you're comfortable doing that?

A Yes.

Q You're comfortable doing that even when you might not entirely agree with some of the rules? If you had it to do, you might write the rules

[92]

differently?

A Yes. I actually, the bankruptcy rule, I can't think of any that are really particularly anything I would particularly have quarrels with but, yeah.

Q So, as a professional, you have come to be comfortable with the notion that you have to, the rules have to be what they are and they have to be followed?

A Yes.

Q The reason I bring this up is I noticed in your questionnaire that you are a person who has some qualms about the death penalty?

A Yes.

Q And what I would like to ask you is, if you were selected to be on this jury, would you be comfortable following the Court's instructions and making a decision within the framework we have described?

A No, I guess I anticipated the question. I guess I would follow the instructions but I have, I guess, what you might call tangential feelings concerning having to do so. And if you want me to elaborate on those --

Q Please do.

[93]

A -- I will. I would think you would. And it has really not so much to do with any of the people in this room or with particular offices that they work for, but I suppose it's a philosophical position. And, that is, I do, I guess resent being put, the possibility of putting, being put in a position to make that decision.

Had I chosen to be a judge in the King County Superior Court or to run for such a position, had I been appointed that, I think that would be different because I would have chosen, that would have been my choice. I would have, you know, made my peace in that respect.

But there's something, I guess, I don't know who I resent, I guess, the people of the state of Washington for putting a regular person in that position. So, that's what --

Q Now, you understand that as a professional, certainly, that our jury system is of very central significance to the way our criminal justice system --

A Right. And I know that my job is not to, you know, if I were a juror, my job would not be to like what I do, it's to do it.

[94]

Q And, obviously, you vote regularly?

A I do.

Q And you participate in the bar association in the profession?

A I belong to the bar association.

Q Okay. And you participate in your community in various ways?

A I suppose I do, yes.

Q And try to be, generally, try to be a responsible citizen and a law abiding citizen?

A Yes.

Q Would you agree that it is a responsibility of being a citizen in our society and in our community to participate in this jury process?

A I would agree.

Q Given that and given the necessity as we have discussed of working within the framework of

a set of rules, would you be able to set aside your resentment and your feelings about the death penalty, which we're all entitled to have feelings about this. The question here is, would you be able to, not withstanding those feelings, accept the law from the Court, consider the evidence that is presented in court and make a decision, a reasoned decision under the

[95]

law of the State of Washington?

A Yes, I would.

Q Thank you.

MR. CLEVEN: I have no further questions.

THE COURT: Thank you, Counsel. The State.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Ms. Henderson, would you agree with me that you have some awfully strong feelings on the death penalty?

A I would agree with you that I do.

Q Would you tell the Court basically how you feel about the death penalty, what you feel it does to a person?

A I guess I would primarily, my primary objection is what I think it does to a society as a whole, and I think I alluded to it in my answer to the questionnaire there. I think it makes, I think I used the word, brutes of us

all. I think I might even change that to I think barbaric. But I think it doesn't enhancement our advancement of as a people and a human race to put other

[96]

people to death. I think it's, basically, it's, much of it anyway, is essential to a point that I don't think as a society we should go and then there are other reasons. I think sometimes the finder of fact is wrong.

Q I have got a question. On your questionnaire it sort of faded off at the end and I could not read that especially down at the very end.

A Interview . . . shall I just read my answer?

Q Yes. If you could speak up for the reporter.

THE COURT: For our record, Ms. Henderson, what number is this?

A This is question number 56.

THE COURT: All right. Thank you.

A And my answer is, "My husband and I talked about whether this might be the case I was summoned for. I expressed to various people my feelings about serving on a death penalty case. No particular something." That must be, I must have been in a hurry. I think I meant nothing particular about this case, though. That's what I meant to say.

Q (BY MR. MATTHEWS) Okay.

A But I didn't say it.

Q Would you agree there is probably quite a few

[97]

people that feel that the death penalty is sort of a tough, sort of a horrible way of handling society's ills?

A Ask the question again.

Q Would you agree that there are a lot of people that think that the death penalty is sort of a horrible way of handling society's ills?

A There certainly are some anyway. I don't know how many.

Q Would you feel that you are a member of a group that feels that way?

A Yes.

Q I think you can understand where I'm coming from of course?

A I certainly can.

Q You speak in terms of brutish barbaric and so on, but then you say, gee, I can follow the law.

A Yes.

Q And it sounds to me like following the law is going to mean that you have got to set aside a lot of your ideals, a lot of your strong feelings about the value of life and so on. And it's just, would that be, is that a fair statement?

A No. I think my reason for saying that I would

[98]

be able to follow the law, I think that comes from being a lawyer and feeling that extra

obligation, perhaps having that I guess ingrained in me or --

Q As we all do.

A Yes, right.

Q I think we all can understand that?

A I guess that's where I'm coming from in terms of my response.

Q So, do you feel that you're, let me put it a different way. Do you feel that your personal feelings about, and your strong feelings about the death penalty could impair you in any way when it comes to following the law?

A I suppose -- let me back up. This is sort of an indirect answer. But when you brought us in the first day some time last week and you met, briefly described the case, you described the death penalty phase of this trial. I understood you to say that mercy was a mitigating factor, so that gave me a little comfort.

And that might be, you know, I don't know what that means because I have never read pattern jury instructions for a death penalty phase of a case. I don't know what context that

[99]

would appear. That's really, I don't know if that's an answer but it's a response.

Q So, what I guess I'm hearing you say is that because of your feelings you sort of would like to have a way out of this, too, have an escape route in which you could, an escape route

which you could take and mercy could be that escape route?

A I suppose you might say that.

Q Your feelings seem strong enough that when you're making decisions, in the back of your mind, you know, people talk of your heart of heart and so on, a deep spot inside of us. Those feelings about the death penalty are always going to be there. A little voice is going to be there all the time, isn't it? When you consider the law and everything else, isn't that little voice going to still be speaking to you, talking about the death penalty, talking about barbaric, brutish and so on? I know it's hard.

A I, having never been in a position, I mean, we take our beliefs with us where ever we go and whatever we do.

Q Okay.

[100]

MR. MATTHEWS: I have no further questions, your Honor.

THE COURT: Ms. Henderson, let me just ask you a couple of final questions here.

VOIR DIRE EXAMINATION

BY THE COURT:

Q I read your questionnaire.

A Yes.

Q And I remember the particulars on there because I was trying to figure out what that word meant, too. I think I understand from

the questions that were asked of you by counsel sort of your feelings about all this.

You understand how important it is to have a jury of people that are seriously willing to consider alternatives. Do you think, and you're the one who can tell us better than anyone else in this courtroom, do you think that if it got down to the penalty phase that you would be seriously able to consider both of those alternatives, or are your feelings so strong that you say, no, I really, I mean, intellectually I could tell myself that, yes, maybe I could, but emotionally I understand that

[101]

that would be an impairment?

A It would be difficult. I mean, I can see myself, I guess I could express it in body language perhaps. Pardon me. I would be sitting there like this. (Indicating).

THE COURT: Okay. Thank you very much. I know it has not been easy. Let me have you step back in there.

MS. HENDERSON: Okay.

THE COURT: Counsel.

MR. MATTHEWS: Your Honor, I would like to put on the record that her body language was that she crossed her arms, held her hand up, crossed her arms and sat back at that particular time.

We would challenge this juror for cause. I think she stated her beliefs quite strongly. She

certainly is much impaired as any other person that's been excused from the jury, and in some instances I would consider she is much more impaired. Her views are extremely strong, even her language barbaric, brutish and so on. I think it is very hard to assume that a person of this intellectual level would allow her strong feelings, feelings that are expressed

[102]

in those terms not to interfere and create problems when it comes to making a final decision. I don't think she could be fair to the State in making a decision in this case. And I believe she is impaired.

THE COURT: Defense.

MR. CLEVEN: Your Honor, we would disagree. This is an articulate intelligent juror who thought hard and long about this situation and decided that she would be able to follow the law. Her body language as was accurately reported by Mr. Matthews in response to the last questions is simply an absolutely appropriate expression of what the situation would be at that point. It would be a presumption of life and the burden would be on the State to present proof beyond a reasonable doubt that the result should be otherwise.

This juror was very clear that she would be able to follow the law and work within the structure that we had described. Mr. .Matthews characterized for her her attitude about mercy as a potential escape valve. It's a factor that can be considered. And in response to the Court's questions, it was very clear that

[103]

she would simply consider that. She would follow the instructions of the Court. She would give serious consideration if that were what she were required to do.

To excuse this juror would be a flagrant violation of Witherspoon, to excuse her for cause, and I would urge the Court to review again Crane vs. Mississippi if the Court has any though of doing this. This would be an absolutely reversible error if this juror were excused for cause at this point. Its' beyond me why the State even requested it.

MR. MATTHEWS: Well, your Honor, we continue to request it. We do not feel it's a reversible error. We feel she is impaired. The argument that he is using now are exactly the arguments that we used the other day. And Mr. Cleven, at that time, was saying that following the law is not sufficient. I don't believe she can follow the law.

THE COURT: She is exactly the flip side of Mr. Jeremy Eisenman this morning counsel. In my opinion in terms of the position versus State and defense, I think she is substantially impaired given her responses. It

[104]

was obvious. The Court will go ahead and excuse her for cause.

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[188]

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THE COURT: All right. Richard Deal. (Prospective Juror, Richard Deal,

[189]

entered the courtroom.)

THE COURT: That's fine, Mr. Deal. Good afternoon.

MR. DEAL: Good afternoon.

THE COURT: Do you have any questions at all about any of the preliminary instructions that you got this afternoon and the format that we were talking about or the reasons why the attorneys have to discuss the penalty phase when there may never really be a penalty phase.

MR. DEAL: No, I think I understand the situation.

THE COURT: Did you answer or nod your head about remembering something about having heard this crime before?

MR. DEAL: No, I did not.

THE COURT: Okay. We'll start with the defense.

MS. HUPP: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Good afternoon. My name is Lin-Marie Hupp, and I'm one of Cal Brown's attorneys.

I would like to start off asking you

[190]

some questions about your feelings about the death penalty. I want to reinforce what the Judge has already told you, which is there are no right or wrong answers. We just need to get information about your feelings so we can do our job.

A Okay.

Q Can you tell me when it was you first realized this was a potential death penalty case?

A Not until last Monday when I was here in the initial jury information session.

Q Okay. Can you tell me when the Judge read that long thing to you and basically told you that this was a potential in the case, can you tell me what you were thinking when you heard that?

A I guess I wasn't surprised when I got the announcement for jury duty. And it was more than the standard two weeks that most everybody else goes to. I thought it must be a pretty substantial case. In my mind I tried to guess what it might be, so this is one of the things that entered into it.

Q Can you give me an idea of what your general feelings about the death penalty are?

A I do believe in the death penalty in severe

[191]

situations. A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the

Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

Q And that case you're talking about, that is the one where he actually came out, the defendant actually came out and said that he actually wanted to die?

A I believe that was the case.

Q Does that have any kind of bearing on your idea that the death penalty was appropriate in his case?

A I believe that it was in that case.

Q If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?

A It would have to be a severe case. I guess I can't put a real line where that might be, but there are a lot of cases that I don't think it's where people would - -

Q Okay. And let me kind of fill in the blanks for myself here by just asking you a couple of questions about that. I'm assuming that there

[192]

would not be any case other than murder that you would think the death penalty would be appropriate?

A I think that is correct.

Q Okay. And the way the law is in Washington anyway, in order to get to the point where you would even consider the death penalty, the

State would first have to prove that you had committed a premeditate murder and one that had been thought about beforehand.

Do you have any kind of feeling that something other than a premeditated murder, in other words, one that would have been planned that would be appropriate for the death penalty?

A No. I think it would have to be premeditated.

Q In addition to that in Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that

[193]

it was done in order to conceal a witness or eliminate a witness.

Does that fall within the class of cases that you think the death penalty is appropriate?

A I think that would be.

Q Okay. Now, how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?

A I think that if a person is temporarily insane or things of that that lead a person to do things that they would not normally do, I think that would enter into it.

Q All right. Other than - - well, maybe what we should do - - the way that the law is in Washington, if the jury finds beyond a reasonable doubt that somebody has committed a premeditated murder with at least one aggravating circumstance, and in this case you have a potential for the four, then the jury reconvenes to consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed.

One sort of aside here, life without

[194]

parole is exactly what it sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.

A I understand.

Q Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A I did not until this afternoon.

Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus

aggravating circumstances beyond a reasonable doubt.

Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible

[195]

and would reviolate if released, I think that's the type of situation that would be appropriate.

Q Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the

death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

[196]

Q Okay. That's very fair. Do you have any kind of feelings about the frequency of the use of the death penalty in the United States today? Do you think it's used too frequently or not often enough?

A It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.

Q It sounds like you're a little more comfortable that it is being used some of the time?

A Yes.

Q You weren't happy with the time when it wasn't being used at all?

A I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

Q Let me ask you, and we may have covered this

already, but let me ask you just to make sure I understand. If the State were to prove beyond a reasonable doubt that the defendant had committed a premeditated murder with aggravating

[197]

circumstances that I have laid out for you, rape, robbery, kidnapping, to conceal or eliminate a witness, at least one of those, in addition another thing you might hear in this trial is some evidence that the defendant deliberately inflicted pain upon the victim before she died for some period of time.

If that was the crime that you heard about and came to a decision about guilty about, do you think you consider a life sentence?

A I could consider it but I don't know if I really have enough information to make a determination.

Q Right. And it's real tough to be asking you these questions and even tougher for you to have to answer them without any evidence before you. But you understand that this is our only time to do that before you have heard all the evidence?

A I understand, yes.

Q As a matter of fact, the law in this state after, even after you have found somebody guilty of really hideous crime like that presumes that the sentence, the appropriate sentence is life without parole. The State has the burden of

proof, again, in the penalty phase. And they would have to prove beyond a reasonable doubt

[198]

that there are not sufficient mitigating circumstances to merit a life sentence.

Are you comfortable with that idea that you start off presuming that, as a matter of fact, even for a hideous crime that a life sentence is the appropriate sentence?

A It is or is not?

Q That it is an appropriate sentence.

A I guess I'm a little confused by the question. So, you go into it with a life sentence is the appropriate sentence?

Q Right. If you look at the chart here, there's almost a mirror image to start off a trial presuming that somebody is innocent and you start off a sentencing presuming that a life sentence is appropriate?

A I see.

Q Okay.

A Yes.

Q Okay. Now, as far as mitigating circumstances, you had mentioned the idea that maybe somebody was temporarily insane. The Judge is going to give you an instruction on mitigating circumstances, and I will defines it for you, but the definition is real broad. The

[199]

definition basically is, any reason, not a justification, not an excuse for the crime and not a defense to the crime, but a reason for imposing something other than death. That's pretty broad.

MR. MATTHEWS: I object to that question. I don't believe that is a question. I believe that's a statement.

THE COURT: The objection will be sustained.

Q (BY MS. HUPP) The judge will instruct you about what a mitigating circumstance is.

But what I want to be real clear about is that it's not a defense to the crime. Okay. In other words, if you believe that somebody was really temporarily insane at the time he committed the offense, well, then it wouldn't be premeditated. It would be an insanity defense, and that would all get dealt with - -

MR. MATTHEWS: Your Honor, again, I am going to object to the nature of the question.

THE COURT: Mr. Deal, you were the one that actually brought it up in terms of the mental status of the person. You are the one who said temporarily insane when they committed

[200]

this kind of crime. You realize that there are particular defenses that may be available in the actual criminal case itself, the guilt phase.

But once you get to the penalty phase, we're not taking about the crime in any way, and you're simply trying to determine what the appropriate

punishment or sanction should be for a crime that a person has been found guilty of. At that point in time, something like all sorts of mitigating circumstances come into it, and mental status can come into it. But it would only be evaluated in the light of the mitigating circumstances, not a defense. Do you understand that?

A Understand.

Q (BY MS. HUPP) To just sort of follow up on that, if mental status came into play and you were presented with some sort of evidence about mental status, is that the sort of evidence you would consider?

A Yes, I could.

Q How about things like somebody's childhood or their emotional development?

A I could consider it. I don't have strong feelings one way or the other.

[201]

Q Okay. All right. And, also, when we talk about mitigating circumstances, what might be mitigating to you might not matter much to the person sitting next to you in juror's box. Do you think you could discuss your feelings about those things?

A Yes.

Q Could you, say the person next to you says something is mitigating and you don't think it's very mitigating at all, could you also discuss it in this situation?

A (Nodding head).

Q Could you respect that other person's opinion?

A Everybody is entitled to an opinion, yes.

Q Another thing that happens at the sentencing phase of the trial is that the jury would have to be unanimous, in other words, everybody would have to agree if they were going to impose a death sentence. If one person, four people, five people, how ever many people don't agree with that, then the sentence is life. Okay. So, it kind of strips away that sort of comfort in numbers that some people get from the idea of having a unanimous decision.

Do you think you can accept the

[202]

responsibility for such an important decision for yourself?

A I do.

Q Okay. Thank you.

MS. HUPP: I have no further questions.

THE COURT: The State.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Mr. Deal, I'm Al Matthews. I'm one of two prosecutors in the case. I have got some very specific questions, and perhaps we can clear them up real rapidly.

I see your step-brother is a policeman and you see him about four times a year.

A (Nodding head).

Q Do you ever have any discussions about the death penalty, is this a subject that ever comes up?

A No.

Q Have you ever had occasion to discuss it at all within the family circle?

A I don't believe so.

Q You mentioned on your questionnaire, and we do read them, that you're in favor of the death

[203]

penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again. Do you remember making that statement?

A Yes.

Q First of all, have you ever been on a jury trial before?

A I have not.

Q Now, you made this statement before you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct would you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove

beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

[204]

A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

A Or was guilty, yes.

Q So, we're talking about that?

A Yes.

Q So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?

A Yes.

Q In other words, nothing, there is very few things in life absolutely certain?

A I understand.

Q And that is basically what we're saying to you, and that is what the term reasonable doubt means - -

A (Nodding head).

Q - - that we don't have to prove it beyond all doubt.

Now, we get to the penalty phase and

the question becomes slightly different. It presumes life as a person is presumed innocent in the guilt phase, it is presumed that the proper penalty for the beginning point in the penalty phase is life in prison without parole.

[205]

Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come in contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death

[206]

penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

[207]

A Yes, sir.

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the

death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the appropriate measure.

MR. MATTHEWS: I have no further questions.

THE COURT: All right. Mr. Deal, there is something that I want to clarify in

[208]

response to some of the questions that were asked of you.

VOIR DIRE EXAMINATION

BY THE COURT:

Q In your questionnaire it talks about beyond a shadow of a doubt, and the prosecutor here went into that a little further. You realize that that is the standard that the law imposes on the State to prove a case beyond a reasonable doubt. And, obviously, that is a

question of interpretation.

You officiate basketball games. That's in your questionnaire. You, even at the college level, knowing how fast that game is, you have to make a call on some of those calls and you have to decide whether to blow that whistle and make that particular call. Do you think you understand the difference between a reasonable call and beyond a shadow of a doubt type call?

A I guess I do. The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or

[209]

something over the years. But I guess the point I was making that it has to be - -

Q You would have to be positive?

A I would have to be positive, that's correct.

Q The State has to convince you?

A Yes.

Q As they would have to convince any reasonable person?

A Yes.

THE COURT: Mr. Deal, let me have you step back into the juryroom. The bailiff will excuse you from there in just a few minutes. Thank you.

Counsel, any challenge to this particular juror?

MR. MATTHEWS: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he

[210]

means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

MR. MULLIGAN: We have no objection.

THE COURT: Counsel, the request of the prosecutor's office, we will go ahead and excuse Mr. Deal.

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FILED

94 MAY 20

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 4, 1993

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[70]

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(Prospective Juror, Lisa M. Denis, entered the courtroom.)

THE COURT: You are Ms. Denis; is that correct?

MS. DENIS: (Nodding head).

THE COURT: Did you have any questions at all about things I talked about this morning when we brought all of you out here?

MS. DENIS: No.

THE COURT: Have you ever been a juror before?

MS. DENIS: (Shaking head).

THE COURT: All right. Now, I do remember from before that you were scheduled to be married late this year?

MS. DENIS: Yes, and my plane leaves December 22 to Boston.

THE COURT: December 22?

MS. DENIS: Yes.

THE COURT: And the wedding is back east?

MS. DENIS: Yes.

THE COURT: In Boston?

[71]

MS. DENIS: Yes.

THE COURT: Did you nod your head at all about having heard anything about this case before?

MS. DENIS: I didn't live in the state at the time.

THE COURT: And since you've been here as a potential juror, have you been able to say away from any press about this?

MS. DENIS: Yes.

THE COURT: I believe we start the questioning with the defense.

MS. HUPP: Thank you, your Honor.

MR. MATTHEWS: Your Honor, could we approach the bench first about one thing?

THE COURT: Sure.

(Side Bar.)

THE COURT: Thank you, Ms. Denis for your patience. But you're sure you really want to get married? That's what we were discussing.

MS. DENIS: Ha, ha. I didn't know if I appreciated the 50 percent here.

THE COURT: I didn't mean to do that. I do that to everybody that comes through here asking to be married by me. So, aside from

[72]

that, we were, there was obviously some concern to your cut off date. I can assure you that one way or another you would be released on that particular day. If something happened and the trial were still going on, we would work it out so that you would be able to go.

MS. DENIS: To the wedding and the honeymoon or just to the wedding?

THE COURT: Ha, ha. Don't worry about it.

You heard what we talked about this morning, though, and some of the areas that they wish to get into. You didn't know anything about this case at all?

MS. DENIS: No.

THE COURT: The other area is, do you have any questions to offer to me about the basic concepts that I talked about, the two phases?

MS. DENIS: We would go into more like what lack of mitigating circumstances, we wold go more into, you would give us more instruction?

THE COURT: Yes. Oh, definitely. Right. The first phase ought to do with

[73]

determining whether or not the State can prove that he committed this crime.

I believe we start with the defense?

MS. HUPP: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Now, we can get started on what you thought you were getting into when you walked out here.

The first thing I want to tell you is that one of the most important things for you to keep in mind here is that we're not, there's no right or wrong answers here. This isn't a test. We're just asking about your opinions so that we can gather some information to do our job. Okay?

A (Nodding head).

Q All we want and all we expect out of you is honest answers?

A (Nodding head).

Q And honest answers on things that are hard to answer. The questions I will be asking you are about things that I'm sure you haven't studied up on too much, certainly not as much as the lawyers and the Judge in this courtroom have?

[74]

One of the things that I want to talk to you about is the law especially as regards kind of the starting point where you start out and how you move through the trial. Okay.

And have you ever seen a trial before?

A On TV.

Q Okay. So, you have never sat through a regular trial like this?

A No.

Q You watched the Raymond Burr tape and you read your little juror's handbook. I'm assuming that you have at least some idea of how the regular part of the trial goes where you're trying to decide if somebody is innocent or guilty?

A Yes.

Q And you understand that you start out with the presumption that the person is innocent?

A Yes.

Q And then the State has to prove the case beyond a reasonable doubt?

A (Nodding head).

Q Do you have any kind of problems with that?

A No.

Q Makes perfect sense to you?

A Yes.

[75]

Q Do you think that you're capable of doing that, deciding whether or not somebody is innocent or guilty of a crime?

A Yes, I do.

Q Now, to get to the kind of special part of this trial, there's every chance in the world that we wouldn't get to that trial at all, the second part of the trial. The only way that you would get to a penalty phase in Washington and under Washington law is if the jury finds the defendant guilty but not just guilty of just murder but also aggravating circumstances.

And what that means is that the jury would have to believe beyond a reasonable doubt that the defendant had committed a premeditated murder and that, in addition, he had in this case as is charged, he had either done it during a rape, a robbery, a kidnapping and/or in order to eliminate a witness.

And it's possible at the end of this trial in the penalty phase that the jury could have found that he did all of those. That he did the premeditated murder and he did it with all of those aggravating factors. That's where your start off. That's if the jury find beyond

[76]

a reasonable doubt the person has done all of those things with at least one of those aggravating circumstances, then we're at the point where the jury needs to decide the penalty. That's where we get the mitigating circumstances stuff. Okay?

First of all, even though the jury found the person guilty beyond a reasonable doubt of all of those things, and actually it's a very horrible crime, the jury starts off presuming that life in prison without parole is the appropriate sentence. A law in Washington says that that is an appropriate sentence, the appropriate sentence unless the jury decides otherwise.

Does that make sense?

A (Nodding head).

Q Now, nobody is going to require that the jury find that death is the appropriate sentence. That's a decision the jury makes. Nobody tells the jury what to do, but the Judge does give you law and guidance and tells you how to make that decision.

Does that make sense?

A Yes.

[77]

Q Okay. The law that the Judge gives you, one of the things he does is he tells you to presume that you are to start off presuming that life is the appropriate sentence, and then in order to move off of that presumption at all, the State again has the burden. They have the burden of proving beyond a reasonable doubt that death is the appropriate sentence.

One of the things that jurors look at when they are looking at making that decision is whether there is mitigating circumstances. You had kind of a question about mitigating

circumstances. The judge would instruct you about kind of a broad definition of what mitigating circumstances are.

But mitigating circumstances can be things like a person's background, their childhood, their emotional development, their mental health.

Do you think you could consider things like that?

A Yes.

Q The question that the jury ends up getting asked at the end is this one, and you need to look at it, and it's kind of confusing. But the general

[78]

idea is that the State would have to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances before the jurors can even vote for the death penalty. Okay.

And the other thing that you should probably know is that the jury, in order to return a death verdict, would have to be unanimous, all the jurors would have to agree to that. In order to return a verdict of a life sentence, the jurors, just one juror, two jurors or three jurors, if all the jurors can't vote for a death sentence, then a life sentence is imposed.

Does this make sense?

A Yes.

Q Okay. Now, does that make you feel a little more comfortable about what we're looking at here?

A Yes.

Q All right. I noticed in your questionnaire that you had noted that you have some concerns or you have struggled with the issue of the death penalty in your life?

A Yes.

[79]

Q It sounded to me as though you have moved from being absolutely opposed to it to a position where you can at least consider, you can understand why it is that some people consider it's necessary?

A I guess the state that I lived in before, it wasn't, there wasn't a death penalty so I grew up, it never was that much of an issue. When I moved here, I didn't realize it until it was in the news one day. And at that point, I started thinking a bit more about it. It would be a very difficult position for me.

Q Right. And I think --

A So.

Q Yeah. It's a real difficult decision for a lot of people.

Have you ever had to decide before anything that was basically a life or death decision?

A No. I don't know. I honestly, and I struggled with this the last week, have, I just -- I don't know if I could vote, I don't know if I could.

Q And understanding that it's especially hard to try and think of something like that when you haven't heard any of the evidence and you're not

[80]

sitting there in the jury box and we're here at the beginning of the trial instead of all the way to the end of the trial.

You have never been on a jury before, right?

A No.

Q You have never had the experience of trying to apply the idea of beyond a reasonable doubt before?

A No. I have had theoretical, I have a friend that is a lawyer, and we have kind of had many theoretical discussions when he went to law school also. So, I have been, but I have never had that opportunity.

Q Sure. You do know that it's the highest standard that we have in our criminal justice system?

A Yes.

Q I mean, as far as beyond a reasonable doubt, it's the highest burden of proof that we have?

A Right.

Q So, you basically are a law abiding person?

A (Nodding head). Yes.

Q Especially here with the judge listening to us, right. Okay.

[81]

And you basically are a civic minded person, you vote or else you wouldn't be here?

A Yes.

Q You're involved in the community?

A Starting to be. We just moved here, but I very much want to be.

Q I get the impression you're a fairly cautious, careful person?

A Regarding?

Q Regarding important things.

A Oh, yes.

Q You don't do snap judgment as far as the important in your life?

A No.

Q Do you think that it's fair if the only people that sit on a death penalty case on the jury are people who object strongly to the death penalty?

MS. FRICKE: Objection, your Honor, improper question?

THE COURT: Objection will be sustained. Ask another question.

MS. HUPP: Okay.

Q (BY MS. HUPP) You understand that it's not an easy decision for anybody to make?

A (Nodding head).

[82]

Q You understand that sometimes a country asks you to do this?

A I guess that's why I'm here.

Q Sure. Sure. Do you have any doubts about your ability to be fair to both sides in the guilt phase of the trial, in other words, in deciding whether or not the defendant committed the crime?

A (Shaking head).

Q Okay. The court reporter is trying to write down everything you say so sometime when you talk real quite it's difficult for him to get.

A Yes.

Q Now, you did put in your questionnaire that as you thought about the death penalty one of the things that you thought about, you had that sort of you grew up believing it was wrong and then one of the things that sort of made you think that maybe it's okay with generalizing about justice?

A I guess that theoretical discussions the point that a truly horrible, horrible, horrible beyond a reasonable doubt type person like Jeffrey Daughmer, in that case, is this not acceptable? And, you know, I felt the taking

[83]

human of life was wrong. It's just not right. But I have been able to see another's point of view in that discussion. But, again, it's very different to have a discussion and to be in that position.

Q Sure, it is. Of course, it is. You're wondering what is proper here. You're sort of feeling that way.

So, there are some crimes that are so horrible that even basically a sentence of prison sort of offends your sense of justice?

A I guess that what would be it.

Q Now, I kind of laid out a little bit of what it is that the State is charging here. What they're expecting to present evidence of is a relativly horrible crime. We're taking about, they're saying that this is premeditated, that it was done, that this murder was done during the course of a robbery, a kidnapping and a rape, that the premeditated murder was done in order to eliminate a witness. In addition, you might hear during the trial that there was, the defendant deliberately inflicted pain on the victim before he killed her.

So, does that sounds like it might be

[84]

the sort of case where it might fit into that classification where you think this might be one of those case where at least the death penalty should be considered?

A Possibly.

Q I know it's really tough for you because you're really bearing the weight of the responsibility possibly of being a jury here.

Do you think that, without asking you to make guesses about what you would actually do as far as voting, I'm not asking you to commit as far as voting, what you would vote, but do you think that if you were to sit on jury, that you could follow the Judge's instructions, okay, just follow his instructions? Do you think you could do that?

A Yes.

Q And do you think that you could follow his instructions to consider the possibility of a death penalty as a sentence?

A Oh, yeah, I could follow the instructions. I think that -- actually making that decision, no.

Q It's a tough one. It's a real tough one.

You could, though, what I'm hearing you say is that you could follow the

[85]

instruction. Could you discuss with the other jurors what you think about mitigating circumstances, what you think about the crime? You're nodding your head, and I need you to --

A Yes.

Q You could discuss that. And you could hear the other juror's opinions about what they think about the crime and what kind of punishment it deserves?

A Yes.

Q And you could talk to them about what they think mitigation, what they think about the mitigating circumstances?

A Yes.

Q And the question I'm hearing in your head is whether or not you would be capable of actually voting for death?

A Right, it would be a moral issue with me.

Q Okay. And you do, although, you have got that sort of emotional response here, you do think that you could put those emotions aside in order to follow the Judge's instructions?

A Yes.

Q Thank you. I'm not going to ask anymore questions, but the prosecutor is going to ask

[86]

some questions. Okay? Thank you.

A Okay.

THE COURT: Mr. Matthews.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Hi, I'm Al Matthews. I'm one of the two prosecutors in the case.

A Hi.

Q This wedding apparently is going to take place on the back east coast?

A Yes.

Q Are you going to be doing, helping in the preparations by long distance, or how is that going to work?

A There are done just about.

Q If this trial goes close to your wedding date, do you think you're going to be a little distracted thinking about that, too, or worried?

A I would be if it got to be the 21st and we were still --

Q Well, the Judge isn't kidding. You're going to get over to the wedding no matter what.

A I think it would be natural to be distracted. It was a hard decision to go ahead and to be

[87]

here for me but it's important to do this.

Q Now, you've spoken about the Daughmer case. What state did you come from?

A Massachusetts.

Q And they do not have a death penalty?

A No.

Q So, this is something fairly new to you?

A Yes.

Q Have you discussed it with anyone since, well, who have you discussed it with?

A My friend.

Q Did the discussion take place before or after you found out you were going to be on a jury?

A We had discussed it before, actually, when we both realized that the death penalty was in Washington. We discussed it at length at that point, and then when I came home and I was, you know, emotionally thinking a lot about this and we did discuss it briefly. I tried not to get to deeply into it. He was wondering why I was so, thinking a lot about it, thinking and not communicating a lot.

Q Okay. Could you share with us just a little bit how the discussions went and what your feelings were?

[88]

A Both discussions?

Q Yes.

A Well, again, it was a moral issue of taking a life. Do we have that right to do that? Is that our position? That's the kind of way that I thought.

Q And its sort of, I don't mean to put words in your mouth, but sort of does it accomplish anything for taking a life for a life. Is that the sort of way the discussion went?

A Yeah, along that lines Yes. What does it prove?

Q In other words, if the State prosecutes someone for taking a life but then they might turn around, and the State might then take life back themselves. Does that make sense to you? Does that bother you?

A Kind of does that even it up?

Q As I said you mentioned the Daughmer case, and you found that particularly horrifying. What was it about that case, the number of people involved, the ages of the people, the acts that he committed?

A The broad scope of the number of people, the fact that it just effected so many people, so

[89]

many families. And that was probably one of the cases where in a conversation does this horrible man --

Q And it's certainly a case a lot of people have heard about?

A Right.

Q Was there any other case that you can think of that entered your mind when you thought of the death penalty?

A Ted Bundy.

Q Ted Bundy. Okay. And, again, that was quite a few people?

A Yeah, and it was just so publicized.

Q Sure. Now, I think it may become apparent to you from the talking we have done over the last few days that there is only one death involved in this particular case?

A Yes.

Q And you are going to hear a lot about it during the guilt phase. And at the end of the guilt phase, of course, you will have to make a decision, and based upon that decision, we

really decide whether we're going to go on to the penalty phase. In other words, if you find him not guilty or do not find him guilty of

[90]

premeditated murder plus an aggravating factor, that would ~~end the~~ case right there.

Would that sort of give you a sense of relief or not?

A It definitely would be a sense of relief not to have to go to the death penalty, yes.

Q Now, if that's the case and you seem to be, you seem to be very candid with us, if that's the case, would you, knowing this might go to a death penalty face, would you want us to prove and convince you beyond any doubt that he actually did it? Would you want to be absolutely sure that he did the crime before you would vote him guilty?

A Oh, yes.

Q Now, you have heard the term beyond a reasonable doubt. And you know that doesn't mean beyond all doubt. It doesn't mean beyond a shadow of a doubt.

Would you be comfortable talking about putting someone to death if we had not proved it beyond a ~~shadow of~~ a doubt?

A It would be to a point of a shadow of a doubt. It would have to be crystal clear, yes.

Q Now, let's suppose that we get to the penalty

[91]

phase. And you know there is two options at that time, life in prison without parole and death. And you know it takes the vote of every person on the jury to, every person has to vote for death before the death penalty is imposed. If one person says no, that's the end of it.

Now, you said to Ms. Hupp that you would be willing to consider, first of all, you would be willing to consider all the mitigating circumstances, things about his life and anything else they might present. And I'm sure you would consider that real fairly?

A Yes.

Q And I'm sure you don't have any problem at all started out with the idea that he should be facing life in prison without parole and not death?

A In the penalty phase?

Q Yes. So, that would be the most comfortable sentence for you and the one that you would be willing to start with?

A Yes.

Q And, of course, you recognize at this point that we're going to be trying to prove to you that there is a reason to put him to death?

[92]

A Yes.

Q Now, would you want us to prove, to convince you -- you said you would consider imposing the death penalty, and you think a lot about it and you would consider it; is that right?

A I would be asked to consider it if we got to --

Q And you could do that?

A (Nodding head).

Q I want to take on step further. We're going to ask you not only to consider it, but we're going to ask you, and we're not asking for a promise or anything at this point. I'd like you to think just a little bit further and decide beyond considering the death penalty, do you think in your heart of hearts you could actually in a case like this ever merely vote to impose the death penalty?

MS. HUPP: Objection, your Honor. The phrasing of the question is asking for a commitment.

THE COURT: Ms. Denis, they're not asking or a commitment. Do you understand the difference between considering theoretical discussion but putting yourself in the position of saying I have to actually do something like

[93]

this? Do you understand that?

A Yes, I was considering it before I went to this point.

THE COURT: Certainly, you wee considering it before. The question that's being asked of you by counsel, if it's not clear to you is, aside from considering it, do you think that if after full consideration you were convinced by the State that you're the kind of person given your own knowledge, your own background, your own opinion that could actually vote to impose a death penalty?

A I don't think I could. It would have to be so crystal clear. It would just have to be --

Q Okay. Well, thank you for being honest with us.

MR. MATTHEWS: We have nothing else, your Honor.

THE COURT: Ms. Denis, let me have you step back in the juryroom for just a minute.

Mr. Matthews?

MR. MATTHEWS: your Honor, we would challenge for because she is impaired. We feel that she feels very strongly about these things that she is going to impose a greater burden on the State in both the guilt phase, and I think

[94]

it's obvious from her conversation that she would like to see it end at the guilt phase and she certainly realizes it can end at the guilt phase if he is not found guilty of premeditated murder with aggravating factors. That doesn't bother me too much.

I thinks she would certainly try to push beyond that, but I think she is going to hold us to a higher standard. I think the real problem, though, is when it comes to the fact that she might actually have to impose the death penalty. I think she is very clear about it. I think her body language and I think everything we have seen, her answers to the question and even the way she sort of, I was going to say took deep breaths at certain times when she was asked certain questions, I think she is trying like mad to comply with the law.

But I think she knows that inside of her there is going to be a voice at the back of her mind that basically tells her she can't do this. I don't think she has it in herself to the impose the death penalty. And for that reasonable we fell she is substantially impaired and would ask that she be refused for cause.

[95]

THE COURT: Ms. Hupp?

MS. HUPP: your Honor, we do not believe that this juror is substantially impaired. I would point out a couple of things. First of all, she never expressed any concern about her ability to be fair in the guilt phase. The only thing that she said was that she obviously believed if the defendant, if we would even get to a penalty phase, but that she was instantaneous every time she answered that she could be fair in the guilt phase.

She has never been on a jury before. She has not heard the definition of beyond a reasonable doubt. She used the same phrase for the guilt phase and the penalty phase as far as what burden she wanted. She wanted to be sure. She wanted things to be crystal clear. When we talked about beyond a reasonable doubt that she has, I would submit as a matter of fact, that that's the sort of standard. She doesn't know legal terms. She is just telling the Court that she would expect it from the State, she would expect them to prove their case. She is not hold them to a different burden in either side.

She indicated that she could and would

[96]

consider the death penalty. She indicated that this case would fit with the class of cases that she thought the death penalty might be appropriate. As this other example she gave, if it was in that where Jeffrey Daughmer and Ted Bundy, I think we have heard a whole bunch of the jurors give those as examples of cases that they thought justice might require the death penalty rather than just life in prison.

The law does not require that she be able to read her own and mind say, yes, I could impose the death penalty. The law requires that she be able to consider it. And she told the Court that she would be able to consider it. She indicated she could deliberate. She indicated that, I can only emphasize, again, that this case fits within the class of case that she thinks the death penalty might be appropriate.

So, I don't think she is substantially impaired and would ask the Court not to excuse her.

THE COURT: Counsel, it is close, as a lot of these questions are listening to her responses. She has never been a juror before.

[97]

She doesn't know technically what the definition of beyond a reasonable doubt is. I doubt that anybody in this room knows technically what beyond a reasonable doubt really means and even in your own mind.

However, she is a little bit different position that a lot of other lay people. One of her fiance's closest friends, as she indicated, is a lawyer and has discuss it going through law school. I think she has fairly good understanding of what we're talking

about. I was not so concerned with her responses of beyond a shadow of a doubt or crystal clear. I think that definitely could fit within the definition of a reasonable doubt.

But what this Court was concerned about was in response to my question, could you consider it? Sure, I've been considering it all along. It's a very real response. Or would you be the type of person that given your makeup, your background, et cetera, that could vote to impose it. Her direct response at that point is, I don't think I could, I don't think I could do it. I believe that meets the definition of substantial impaired.

[98]

MS. HUPP: And I would just point out to the Court that she added to that it would help to be crystal clear. Again, she was just indicating, it's our position she was just indicating that the State would have to prove it.

THE COURT: The court will excuse Ms. Denis.

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FILED

NOV 12 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Caption Omitted In Printing]

DEFENDANT'S MOTION TO RECALL VENIRE MEMBER OR FOR MISTRIAL AND NEW PANEL, WITH MEMORANDUM

***

I. *MOTION*

COMES NOW the defendant Cal Coburn Brown, moving the Court to recall venire member Kristin Ann Henderson, excused by the Court on the State's challenge for cause on Wednesday morning, November 3, 1993. In the alternative and in the event Ms. Henderson is no longer available or since her release has been exposed to publicity or otherwise disqualified, Mr. Brown would move for a mistrial and for a new panel of prospective jurors to be called. This motion is brought pursuant to the guaranties of U.S. Const. ams. VI, VIII, and XIV, Wash. Const. art. 1 §§ 3, 14, and 22, and CrR 6.4(a) and (c). It is based on the proceedings of record herein, and further supported by the memorandum which follows.

II. *MEMORANDUM*

A. *STATEMENT OF CASE*

During preliminary voir dire on issues specific to the death penalty, venire member Kristin Ann Henderson was called and questioned as to her qualifications to sit as a juror in this case. Ms. Henderson's confidential juror questionnaire, which is preserved elsewhere, included several responses clearly indicating a general antipathy towards the death penalty. The substance of these responses, including words such as "brutish" and "barbaric," was reaffirmed during oral questioning. She also indicated that she was relieved when she heard the Court's instruction that "Mercy, in and of itself, may be a mitigating circumstance," and further stated, with the help of gestures, that she would adopt a "prove it" attitude if called on by the State to decide that a penalty of death was warranted.

Ms. Henderson, who is trained and employed as an attorney, consistently stated that she would set aside her feelings about the death penalty to the extent required to follow the court's instruction and dispose of all issues in accordance with the evidence and the law. Nonetheless, the State challenged her and the Court excused her as "substantially impaired" pursuant to *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S.Ct. 844 (1985).

A transcript of her voir dire has not been requested, as Mr. Brown's disagreement regarding the Court's ruling has to do with the application of a standard rather than the wording of any of the juror's responses. If the Court has any uncertainty

or disagreement about those responses, Mr. Brown would suggest that a transcript be obtained.

B. *ARGUMENT*

Twenty-five years ago, the United States Supreme Court condemned the use of challenges for cause to exclude death-scrupled jurors from service on death penalty juries. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S.ct. 1770 (1968). The problem presented in *Witherspoon* grew out of a trial court proceeding in which

> the tone was set when the trial judge said early in the voir dire, "Let's get these conscientious objectors out of the way, without wasting any time on them." In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment. Six said that they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return a verdict of death. Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having "conscientious or religious scruples against the infliction of the death penalty" or against its infliction "in a proper case" and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.

391 U.S. at 514-15.

One juror was questioned about her scruples and, without indicating any abolitionist sentiment or any inability to set her feelings aside, indicated that she "would not 'like to be responsible for . . . deciding somebody should be put to death.'" 391 U.S. at 515. The Court ultimately determined that exclusion of such jurors amounted to unfairly and unconstitutionally preselecting a "hanging jury." 391 U.S. at 522. In two footnotes that were to become the case's better-known legacy, the Court allowed that prospective jurors could be constitutionally excluded for cause when their view on the death penalty precluded a fair consideration of the evidence or a fair application of the law. 391 U.S. at 515 n. 9 and 522 n. 21. The Court was careful to point out, in another footnote, that

> [i]t is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.

391 U.S. at 514 n. 7.

After *Witherspoon* was decided in 1968, the death penalty went into a brief eclipse between *Furman v. Georgia*, 408 U.S. 238, 32 L. Ed. 2d 346, 92 S.Ct. 2726 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S.Ct. 2909, (1976). The *Witherspoon* issue was subsequently revisited several times, and in 1985 the Court made it clear

that a slavish adherence to the exact text of the *Witherspoon* footnotes was not required, and that, in fact, the constitution permits exclusion for cause of any juror whose "views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). The majority made it clear that this was not a retreat from the essential holding in *Witherspoon*, but merely a modification of the tests indicated, arguably in dicta, in *Witherspoon*'s famous footnotes. *Witt*, 469 U.S. at 424 n. 5.

After *Witt*, the next landmark case about death-penalty jury selection was *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986). Justice Rehnquist, as he had in *Witt*, wrote the majority opinion in *McCree*. In explaining the nature of the "death-qualifying" test first permitted by the *Witherspoon* footnotes and later modified in *Witt*, Justice Rehnquist offered the following observations:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. . . [T]he group of "Witherspoon-excludeables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case.

476 U.S. at 176. Elsewhere in the opinion, it is made clear that the term "Witherspoon-excludables" took account of the *Witt* modification. 476 U.S. at 167 n.1.

About a year later, the Court returned to the issues involved in death penalty jury selection in *Gray v. Mississippi*, 481 U.S. 648, 95 L.Ed.2d 622, 107 S.Ct. 2045 (1987). In *Gray*, the trial court had excused for cause a juror who was not excludable under *Witherspoon* and *Witt*. The trial court's action was taken after the State, having exhausted its peremptory challenges, indicated that it would challenge the juror if another peremptory were available, and also after an argument that the Court had forced the State to use several of its challenges by refusing to excuse for cause other jurors who were excludable under *Witherspoon* and *Witt*. 481 U.S. at 651-57. After stating the rather convoluted procedural facts, the Court reviewed and reconfirmed the principles first expressed in *Witherspoon*, adhered to in *Witt*, and reaffirmed in *McCree*. 481 U.S. at 656-59. The Court went on to recognize the clear error presented, and to hold that harmless-error analysis generally does not apply to *Witherspoon* violations. 481 U.S. at 659-72 (constituting majority and in part plurality opinion by Justice Blackmun and concurring opinion, establishing majority on rejection of harmless-error analysis, by Justice Powell). This latter holding represented an affirmation of the Court's earlier per curiam opinion in *Davis v. Georgia*, 429 U.S. 122, 50 L.Ed.2d 339, 97 S.Ct. 399 (1976) (where one juror was dismissed in violation of *Witherspoon*, reversible error was found even though other similarly-situated jurors were not dismissed).

In the context of this case, the cases discussed above show that the excuse for cause of venire member Henderson was per se reversible error, not subject to harmless-error analysis. While it would not be inaccurate to describe Ms. Henderson's responses as indicating an extreme distaste for the death penalty, she nonetheless made clear that she would subordinate her personal views to the requirements imposed by the law and by her oath as a juror. This is all that *Witherspoon* requires, 391 U.S. at 514 n. 7, and remains all that is required after *Witt*, see *McCree*, 476 U.S. at 176, *accord*, *Gray*, 481 U.S. at 658.

C. *CONCLUSION*

Mr. Brown respectfully moves that the Court recall juror Henderson or, in the alternative, that the panel be stricken and another summoned to commence voir dire anew.

Respectfully submitted,

/s/ Terry L. Mulligan

TERRY L. MULLIGAN, WSBA #16076

/s/ Lin-Marie Hupp

LIN-MARIE HUPP, WSBA #16149

/s/ Kern Cleven

KERN CLEVEN, WSBA #13455

Counsel for Cal C. Brown

FILED

NOV 16 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Caption Omitted In Printing]

DEFENDANT'S MOTIONS TO RECONSIDER RULINGS DENYING CHALLENGES FOR CAUSE AGAINST JURORS MCKENNAN AND DRAKE, WITH MEMORANDUM

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I. *MOTIONS*

COMES NOW the defendant Cal Coburn Brown, moving the Court to reconsider its oral rulings herein denying Mr. Brown's motions to excuse for cause prospective jurors Robert Eugene McKennan and Donna Maxine Drake, each based upon the juror's responses during preliminary voir dire limited to issues surrounding the death penalty and exposure to pretrial publicity. This motion is brought pursuant to U.S. Const. ams. VI, VIII and XIV, Wash. Const. art. 1 §§ 3, 14 and 22, CrR 6.4(c) and RCW 4.44.170(2) and 4.44.190. It is based on the record of proceedings herein, including a transcription of juror McKennan's voir dire, and further supported by the memorandum which follows.

II. *MEMORANDUM*

A. *STATEMENT OF CASE*

During preliminary voir dire herein on issues relating to the death penalty and pretrial publicity, venire member Robert Eugene McKennan was question on Tuesday, November 2, 1993 and venire member Donna Maxine Drake on Monday, November 8, 1993. Before completing their questionnaires, both prospective jurors had heard the Court's advance oral instruction outlining the bifurcated trial process, including the text of the statutory question in a death penalty sentencing proceeding and an abbreviated definition of "mitigating circumstances."[1]

On their questionnaires, both these jurors denied any general feelings about the death penalty. Both also denied any religious, conscientious, political or philosophical views influencing their views about the death penalty (in response to the question about religious or conscientious convictions, Ms. Drake added, "I truthfully feel it's on an individual basis.")

Just before oral questioning, each of these jurors was again advised orally by the Court of the bifurcated trial process. This time, each juror was part of a much smaller group (perhaps half a dozen venire members), and the Court's explanation was aided by a chart which clearly delineated the two phases of trial, the continuing burden on the State to

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[1] The Court's advance oral instruction did not make mention of the presumption of life or burden of proof in a death penalty sentencing proceeding, except to the extent indicated in the statutory question.

provide proof beyond a reasonable doubt, and the corresponding presumptions of innocence (guilt phase) and of life (penalty phase). The Court's explanation to Mr. McKennan's group has been transcribed.

The oral questioning of each juror developed in a similar fashion: Each gave responses indicating a predisposition to automatically vote for a penalty of death upon conviction; each gave other responses indicating a desire and intention to follow the court's instructions.[2] For each of these jurors, the latter responses tended to be the result of detailed leading questions. In each case, Mr. Brown challenged for cause, and in each case the challenge was denied.

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[2] Mr. McKennan's responses to this effect appear at pages 8-14 of the transcription of his voir dire. In this portion of his voir dire, Mr. McKennan indicated that the death penalty was the only appropriate penalty for premeditated murder; described the presumptive sentence for aggravated murder as sitting in jail, eating nice food, and watching T.V. for the rest of one's life; specifically rejected life without release or parole as a meaningful alternative to death; and indicated he would need "overwhelming evidence" or a "recommendation of the court" in order to consider a sentence other than death. Even after further instruction from the Court, Mr. McKennan indicated, at pp. 23-24, that nothing he had heard affected his basic position. It is counsel's recollection, and the record will confirm or not, that Ms. Drake gave responses similar to Mr. McKennan's, in her case indicating that death would be the appropriate penalty if the State had proven premeditation and an aggravating circumstance. Ms. Drake's response to this effect actually came towards the end of her voir dire, while Mr. McKennan's was nearer the beginning of his.

Mr. Brown now asks the Court to reconsider these rulings.[3]

B. *ARGUMENT*

The United States Supreme Court first indicated that the *Witt-Adams* standard for exclusion for cause (juror's views would "prevent or substantially impair" performance) was mandatory where a juror's predisposition impaired the ability to consider a sentence other than death in *Ross v. Oklahoma*, 487 U.S. 91, 85-86, 101 L.Ed. 2d 80, 108 S.Ct. 2273 (1988). The binding effect of the views expressed in *Ross*, however, was subject to some doubt, as no prejudice was found in that case, the defendant having removed all death-prone and properly excludable-for-cause jurors through peremptory challenges. The voir dire of the juror who apparently should have been excluded in *Ross* was described thus:

> Darrell Huling's name was drawn to replace the juror excused by the defense with its fifth peremptory challenge. During voir dire, Huling initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate. On further examination by defense counsel, Huling declared that if the jury found petitioner guilty, he would vote to impose death automatically.

487 U.S. at 83-84.

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[3] In asking reconsideration of these rulings, Mr. Brown does not abandon any of his other challenges for cause denied by the Court; these two have been singled out as, in counsel's view, the most obviously erroneous rulings.

The view suggested in *Ross* was made unmistakably effective several years later, in *Morgan v. Illinois*, ___ U.S. ___, 119 L.Ed.2d 492, 112 S.Ct. 2222 (1992). In *Morgan*, the trial court inquired specifically whether any member of the venire "had moral or religious principles so strong that he or she could not impose the death penalty 'regardless of the facts.'" 119 L.Ed.2d at 498. The trial court, however, refused a defense request to inquire whether any juror would automatically vote for death, regardless of the facts, if the defendant were convicted. The trial court apparently felt it was an adequate substitute to ask each juror some version(s) of two questions, the first asking whether the juror would follow the court's instructions on the law, even though the juror might disagree with the law, and the second asking whether the juror knew of any reason he or she could not be fair and impartial, or give both sides a fair trial. 119 L.Ed.2d at 499.

The majority opinion gives clear and unequivocal effect to he *Ross* language which seemed to have extended the *Witherspoon-Adams-Witt* line of cases so as to constitutionally require the exclusion of death-prone jurors. 119 L.Ed.2d at 502-503 (Part II B). In rejecting Illinois's claim that the trial court's questions had been adequate to this end, the Court observed that, by its very nature, a disqualifying bias will often prevent an individual from recognizing that his or her views are inconsistent with the law or with an ability to be fair

and impartial.[4] 119 L.Ed.2d at 506-507 and n.9 (Par II D); *see also* 119 L.Ed.2d at 499 n.2.

If "follow-the-law" and "be-fair-and-impartial" questions do not suffice to disclose a disqualifying bias in favor of the death penalty, it naturally follows that responses couched in such terms are inadequate to overcome the disqualifying effect of other responses clearly indicating such a bias. Where, as here, the disqualifying responses came after and were contrary to several rounds of detailed instruction on the law, and where the jurors involved seem not to have even recognized the inconsistent nature of their responses, there should be no question about exclusion for cause.

C. *CONCLUSION*

Mr. Brown respectfully requests that the Court reconsider its ruling regarding venire members McKennan and Drake, and excuse both jurors for cause.

Respectfully submitted,

/s/ Terry L. Mulligan

TERRY L. MULLIGAN, WSBA #16076

/s/

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[4] By separate motion and memorandum, Mr. Brown has asked that this Court reconsider its ruling releasing for cause venire member Kristin Ann Henderson, who indicated a strong antipathy towards the death penalty but a determination to nonetheless follow the law and fairly consider it if required to do so. Mr. Brown would urge the view that a juror who recognizes that her views may not be entirely consistent with the law's requirements is far more likely to be and more capable of being fair despite those views than is a juror who does not see his or her own bias.

for LIN-MARE HUPP, WSBA #16149

/s/ Kern Cleven

KERN CLEVEN, WSBA #13455

Counsel for Cal C. Brown

FILED

94 MAR 7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 22, 1993

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[3]

MORNING SESSION

November 22, 1993

10:00 o'clock a.m.

(The following occurred in the absence of the jury panel)

THE COURT: Thank you. Good morning. Please be seated.

Counsel, we're back on the record. As I indicated in chambers, we've got most of our jurors here. Ms. Mathieu, number 8, had called about 20 minutes ago now and indicated she was just leaving Bellevue, so she should be here later today. The only one who we have not heard from I believe so far is Ms. Harmon who is number 11 in the box.

Counsel, we had some pretrial matters to finish up or matters dealing with the jury to finish up prior to bringing them out?

MR. CLEVEN: I believe so, your Honor. There are a few motions outstanding the State has now filed a response to on Thursday, was served and should have been received by the Court.

THE COURT: Yes.

MR. CLEVEN: The first matter I think logically to take up is the motion regarding member Henderson, a motion to either recall her or strike the panel and begin from scratch in the alternative. It seems

[4]

logical to take that one up first.

As indicated in our memorandum, it's our recollection that Ms. Henderson did not give any responses which disqualified her and that, in fact, her responses were consistent with a great deal of authority from the United States Supreme Court indicating the type of juror who would be and should be permitted to sit and who, in fact, would be error to excuse for cause, even though the juror may have some opinions, negative opinions towards the death penalty.

I don't believe there's a whole lot I can add to our motion, your Honor. We would simply be moving the Court at this time to recall Ms. Henderson or to strike the panel if she's no longer available.

THE COURT: All right. Ms. Fricke, I did receive the State's response to defense motion regarding the jurors, and that included Ms.

Henderson. Is there anything you'd like to add for the record?

MS. FRICKE: Just to emphasize that Ms. Henderson not only held strong opinions against the death penalty, but that through both her answers on the questionnaire as well as her answers during voir dire and her body language, which the State noted on

[5]

the record, it was clear that she could not set those opinions aside and be an impartial juror, so she should be excused for cause and this Court should not reconsider its previous ruling.

THE COURT: Counsel, I looked back on my notes regarding the voir dire that was done of Ms. Henderson and the reasons why she had been excused by the Court, and I am convinced that she was substantially impaired, so the motion to recall Ms. Henderson or for the mistrial and calling for a new panel will be denied.

MR. CLEVEN: Your Honor, for purposes of clarity of the record, is the Court relying on any response Ms. Henderson gave as disqualifying her or is the Court finding that she was willfully misrepresenting herself to the Court in the course of voir dire?

THE COURT: As we indicated before, counsel, it's difficult -- there is not any one particular response from any one of these jurors I think that is definitive for the most part. It's more of a total overall impression from everything that they have said. With Ms. Henderson I guess what was most convincing was the body posture, the things that

were unsaid because of the fact of the way she crossed her

[6]

arms, sat back and what she was telling us at that point in time.

MR. CLEVEN: Your Honor, that would then bring us to the other two jurors, McKennan and Drake. Mr. McKennan we actually have a transcript of. Ms. Drake, I think it's our recollection her voir dire was very much similar to Mr. McKennan's.

We feel that by the logic of the Court's ruling with Ms. Henderson, that Ms. Henderson is excusable because of a body gesture she made that was arguable consistent with the requirement that the burden of proof beyond a reasonable doubt be on the State during the penalty phase and that there be a presumption of life during the penalty phase, we feel that with regard to members McKennan and Drake who openly indicated hostility to the requirements of the law and really indicated no particular predisposition to follow the law, and even after repeated instructions as to the law whenever they were asked open-ended questions about how they would approach the matter, consistently gave responses inconsistent with the requirements of the law, and it was only when they were asked very close, leading questions that they were able to conform their responses to the requirements that the Court will be no doubt laying

[7]

down should there be a penalty phase in this matter.

They won't have counsel and the Court in chambers reminding them with close, leading instructions -- close, leading questions what the Court's instructions are. They had ample instruction from the Court the first day before they filled out the questionnaire and on the day that they came in for their individual voir dire, and both of them managed, nonetheless, to give answers that were inconsistent with the law's requirements.

If member Henderson is excludable, surely these two jurors are excludable for cause, and we would implore the Court to excuse them at this time.

THE COURT: Ms. Fricke?

MS. FRICKE: With respect to Ms. Drake, in her questionnaire and during the questioning she actually said that her views about capital punishment were not all that strong, so as far as the two part consideration that this Court looks at, first of all, does the juror have a strong feeling in favor of the death penalty, and, second of all, can they set that aside, Ms. Drake doesn't even meet that first prong. She said she didn't have a strong feeling about capital punishment.

There was nothing put on the record by the

[8]

defense about her particular body language or her expressing herself in some way other than words. This juror said that she could look at the specific circumstances of the case and consider all of the facts before deciding whether a death penalty is appropriate.

With respect to Mr. McKennan, he did state strong feelings in favor of the death penalty, but on questioning by counsel and the Court, it was clear that he could consider all circumstances and all facts presented to him and that he would not automatically vote for a death sentence, so we ask the Court to deny reconsideration and to excuse both of these jurors for cause.

THE COURT: Anything further, counsel?

MR. CLEVEN: The State has just asked the Court to excuse both jurors for cause and we go along with that.

MS. FRICKE: I'm sorry, deny their challenge for cause.

THE COURT: I heard that too.

MS. FRICKE: That's what I thought I said.

THE COURT: Counsel, in looking back at my notes, while I think both Mr. McKennan and Ms. Drake did indicate at some point in time in response to a

[9]

question by counsel for the defense about their feelings about the death penalty or the death sentence being the only potential sentence for this kind of crime, in looking at everything that they said over the period of time that they were being questioned by both sides, I think it was obvious that they both indicated they could be fair and open-minded about possible punishments, both life without parole or the death sentence.

While they gave answers that were obviously equivocal at times, I think they both indicated that they could set whatever specific feelings that they had aside and base the decision that they are making on the specific facts that were presented to them at trial, either in the guilt phase or in the penalty phase.

The motions to reconsider the rulings against both Ms. Drake and Mr. McKennan will be denied.

MR. CLEVEN: I'd point out again, your Honor, that it's entirely inconsistent with the Court's treatment of Ms. Henderson. She also indicated that she could set aside her feelings. There seem to be two standards here being applied, and we object in that regard.

THE COURT: Your objection will be noted.

***

FILED

94 MAR 7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 29, 1993

***

[93]

***

You're free to go to lunch on your own. Be back here at 1:25 for further instructions.

(The following occurred in the absence of the jury)

MR. MATTHEWS: Your Honor, we would like to put one thing on the record real quickly. I note the Court covered it, but we did have two challenges left at the end that we did not use.

***

KING COUNTY SUPERIOR COURT

Date: OCT 25 1993 Page 1 of 1

[Caption Omitted In Printing]

***

Minute Entry

4.0-JYP		
	Trail – Aggravated Murder 1°	
9:00-3:00	Jury Voir Dire Commences.	
	Continued to 10-26-93, 9:00 a.m.	Sub #
		151B

KING COUNTY SUPERIOR COURT

Date: OCT 26 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from Oct 25, 1993

Minute Entry

2.5

(2.75JYP) | Def. And Respective Counsel Present
| Juror Voir Dire Continues
| Jurors Absent

***

***

***

| Continued To 10-27-93. 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: OCT 27 1993 Page 1 of 2

[Caption Omitted In Printing]

Continued from 10-26-93

Minute Entry

JYP 5.0

| Def. And Respective Counsel Present.
| Prospective Jurors Present
| Voir Dire Continues

***

→ | Richard Crumley

| State Addresses The Court Regarding
| Procedure In Voir Dire
| Individual Voir Dire To Limited Inquiry
| Regarding Death Penalty Phase:
| 1. Larrie Jo Aalvik

| Counsel And The Court Discuss
| Introduction Of Case To Prospective Jurors

| Individual Voir Dire Continues:

| 2. Gary Anderson

Minute Entry

DEPT 12

| 3. Daniel Baer

| 4. Helen Batten

| 5. Sharon Bohinski

|

| Court's Inquiry Of Ms. Bohinski

| Defense Inquiry Of Ms. Bohinski

|

| Court Excuses Ms. Bohinski For Cause

|

| Individual Voir Dire Continues:

|

| 6. Cecil Braeden

|

| Scheduling Discussion And Discussion On

| Mitigation Questions Objection.

|

|

|

| Continued To 10/28/93 At 0900

|

| Court Adjourns

KING COUNTY SUPERIOR COURT

Date: OCT 28 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from OCT 27, 1993

Minute Entry

JYP 4.75

| Def. And Respective Counsel Present.

| Jurors Absent

| Respective Counsel And The Court

| Discuss Voir Dire.

| Jurors Present

| Voir Dire Continues (Individually)

| William Sutherland – State's Challenge.

| Grant

| Mary C. Rivoire – No Challenge

| Chester Paul – Def's Challenge Denied

| Mariquita Clark – No Challenge

| James Estes – No Challenge

| Karen Erickson – Excused

| Laura Faulkner – No Challenge

| William Van Winkle – Excused

| Linda Dingledy – Excused

|

| Continued To 11-1-93, 9:00

KING COUNTY SUPERIOR COURT

Date: NOV 1 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from OCT. 29, 1993

Minute Entry

JYP 5.75

| Def. And Respective Counsel Present.

|

| Voir Dire Continues Individually:

| Willis Kroetsching – Def's Challenge.

| Granted.

| Robert Reimer – No Challenge

| Wheeler Osborn – Def.'S Challenge.

| Granted

| David B. Peace – No Challenge

| Gregory M. Fox – No Challenge

| Tommy Corder – No Challenge

| Paul Jorgensen – Def's Challenge.

| Granted.

| Grace Mickelson – Def's Challenge.

| Granted

| Harold F. Fisher – Excused

| Michael W. Lovell – Def's Challenge.

| Granted

| Victor Obeso – State's Challenge. Denied

	Betsy A. Mathieu – No Challenge
	Continued To 11-2-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 2 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 1, 1993

Minute Entry

JYP – 5.0

***

| Voir Dire Continues Individually

| Ann L. Wallis-Fetterman - Excused

| Jeanette Marr – State's Challenge.

| Denied.

| Shirley Yost – No Challenge

| John Hamakami –No Challenge

| Patricia A. Harmon – No Challenge

| Kelsang Tsatultsang –Excused

| William Ring – No Challenge

| Robert E. Mckennan – Def's Challenge.

| Denied

| Dana G. Montgomery – No Challenge

| Pamela J. McDaniel – No Challenge

| Donald E. Siskar – No Challenge

***

| Continued To 11-3-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 3 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 2, 1993

Minute Entry

5.0 – JYP

| Def. And Respective Counsel Present
| Voir Dire Continues Individually.
| Jeremy Eisenman – Def's Challenge.
| Granted.
| Barbara Lawrence – No Challenge.
| Cindy S. Sullivan – No Challenge
| Gordon Mccaffrey – No Challenge
| Kristin A. Henderson – State's
| Challenge. Granted
| Emerson R. Cheever – Def's Challenge.
| Denied.
| Marilyn M. Finnila – No Challenge
| Martin C. Peterson – No Challenge
| Marjorie H. Fisk – No Challenge
| Anne B. Forman –No Challenge
| Richard D. Deal – State's Challenge.
| Granted
| Tony Ono – No Challenge
|

Continued To 11-4-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 4 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 3, 1993

Minute Entry

JYP 5.0

| Def. And Respective Counsel Present.
| Voir Dire Continues Individually
| Joseph C. Pabillon – Excused
| John Reynozo – State's Challenge.
| Granted.
| Donna E. Lundquist – Excused
| Kim R. Ybarra –Def's Challenge. Denied.
| Lisa M. Denis – State's Challenge.
| Granted.
| Edwin E. Dorothy – No Challenge
| Roxanne M. Hadfield – No Challenge
| Brian E. Holly – No Challenge
| Joan A. Kimball – No Challenge
| Doris I. Nelson – Excused
| Jeffrey S. Phillips – No Challenge
| Irene R. Kirschnick – Def's Challenge.
| Denied
|
| Continued To 11-5-93, 8:30 a.m.
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 5 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 4, 1993

Minute Entry

JYP 2.25

| Def. And Respective Counsel Present.

| Voir Dire Continues Individually

| Jon C. Miner –Def's Challenge. Denied.

| Maggie M. Nowakowska – No Challenge

| Phillip J. Herrera – No Challenge

| William J. Robbins – Def's Challenge.

| Denied.

|

| Continued To 11-8-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 8, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 5, 1993

Minute Entry

5.5 JYP

| Def. And Respective Counsel Present
| Voir Dire Continues Individually
| Paul Chambers – Excused
| Phillip W. Hagen – Excused
| Nancy Shortt – No Challenge
| Althea Noel – State's Challenge. Denied
| Morgan Hausrath – No Challenge
| Bradford K. Chinn – No Challenge
| Steve P. Schiller–No Challenge
| Mildred R. Crocket – Excused
| Jane Peter – No Challenge
| Donna Drake – Def's Challenge. Denied.
| Brian Kosai – Def's Challenge. Denied.
| Christopher M. Schmidt – Def's
| Challenge. Granted.
|
| Continued To 11-9-93, 9:00 a.m.
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 9, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 8, 1993

Minute Entry

4.25 JYP

| Def. And Respective Counsel Present
| Voir Dire Continues Individually
| Robert S. Parker. State's Challenge.
| Denied.
| Sandra L. Sperry. No Challenge
| William A. Darlington. No Challenge
| Charlotte Welch. No Challenge
| Michael D. Dykeman. No Challenge
| James J. Kullberg. Excused
| Roger Croisier. No Challenge
| Angelika A. Hayden. No Challenge
| Mary M. Perkins. State's Challenge.
| Granted
| Continued To 11-10-93, 9:00 a.m.
|
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 10 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 9, 1993

Minute Entry

JYP 4.5

TTIME .75 | Def. And Respective Counsel Present.
| Voir Dire Continues Individually
| John T. Holland. Def's Challenge.
| Denied.
| Deborah L. Hubbard. No Challenge
| Brenda D. Vasser. Def's Challenge.
| Granted
| Judy A. Riley. No Challenge
| Susan G. Hulsey. Pltf's Challenge.
| Denied
| Marc T. Glaser. Def's Challenge.
| Granted
| Mark E. Hergert. Excused
| Discussion Of Transcrit Of Confession.
|
| Continued To 11-15-93, 9:00 a.m.
|
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 22 1993 Page 1 of 2

[Caption Omitted In Printing]

Continued from NOV 16 1993

Minute Entry

JYP 5.5

| Def. And Respective Counsel Present.
| Jurors Absent (Juryroom).
|
| Def. Motion To Recall Henderson Or
| Strike Panel.
| Respective Counsel Make Argument
| Court Ruling: Motion Denied.
|
| Def. Motion To Reconsider McKennan
| And Drake And Have Them Dismissed
| For Cause.
| Respective Counsel Make Argument.
| Court Ruling: Motion DENIED; Def.
| Objection Noted.
|
| Discussion Between Court And Counsel
| Re; Scheduling.
|
| Prospective Jurors Present.
| Voir Dire Continues.

| Prospective Jurors Absent (Juryroom).

|

| State Objection To Def. Use Of The Word "Torture" When Questioning Prospective Jurors.

| Def. Objection To Restriction Being Put On Questioning Of Prospective Jurors.

| Court Ruling: Counsel Will Stay Within Perameters Of The Court.

Minute Entry

| Prospective Jurors Present.
| Voir Dire Continues.
|
| All Prospective Jurors Excused At 2:40 pm
| Until November 23, 1993 At 9:00 am
| Except Hamakami,Harmon, Sullivan,
| McKennan And Montgomery.
|
| Prospective Juror Sulllivan Excused Until
| 9:00 am On November 23, 1993.
|
| Def. Motion To Have Prospective Juror
| McKennan Excused For Cause.
| Respective Counsel Make Argument.
| Court Ruling: Motion GRANTED.
|
| State Motion To Have Prospective Juror
| Hamakami Excused For Cause.
| Respective Counsel Make Argument.
| Court Ruling: Motion GRANTED.
|
| Prospective Juror Harmon Excused Until

| 9:00 am On November 23, 1993.

| Joint Motion To Have Prospective Jurors
| Fox And Montgomery Excused For Cause.
| Court Ruling: Motion GRANTED.

| Cause Continued To November 23, 1993
| At 9:00 am.

KING COUNTY SUPERIOR COURT

Date: NOV 23, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 22, 1993

Minute Entry

JYP-4.5

Def. And Respective Counsel Present.

Voir Dire Continues

Continued To 11-24-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 24, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV. 23, 1993

Minute Entry

JYP 2.75

Def. And Respective Counsel Present.

Voir Dire Continues.

Continued To Nov 29, 1993

KING COUNTY SUPERIOR COURT

Date: November 29, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from November 24, 1993

Minute Entry

JYP-3.0

TTIME – 2.0

| Def. And Respective Counsel Present

| Voir Dire Continues.

| Jurors Sworn And Impaneled To Try This Cause:

| Phillip Herrera Charlotte Welch (3rd Alt.)

| William Robbins Michael Dykeman

| Robert Reimer (2nd Alt.) Patricia Harmon (4thAlt.)

| David Peace (1st Alt.) Bradford Chinn

| Roger Croisier Sandra Sperry

| Tommy Corder Angelika Hayden

| Edwin Dorothy Tony Ono

| Betsy Mathieu Maggie Nowakowska

| The Court Makes Preliminary Remarks To The Jury.

| Jury Absent

***

FILED

DEC 22 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)
Plaintiff,	) NO. 91-1-03233-1
v.	)
CAL COBURN BROWN,	)
Defendant.	)

COURT'S INSTRUCTIONS TO THE JURY

SENTENCING PHASE

December 22, 1993

/s/ Ricardo S. Martinez

JUDGE RICARDO S. MARTINEZ

NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It is also your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The evidence you are to consider consists of testimony of the witnesses and the exhibits admitted into evidence in phase one of this trial and during this special sentencing hearing. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the

witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or the law given to you by the court.

The lawyers have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.

The law does not permit me to comment on the evidence in any way and I have not intentionally done so. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight, effect or believability of the testimony of a witness or of other evidence. If it appears to you that I have so commented, during either the trial of the giving of these instructions, you must disregard such comment entirely.

NO. 2

Jurors should consult with one another during deliberation. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

NO. 3

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, and the sources of the witness's information, together with the factors already given you for evaluating the testimony of any other witness.

NO. 4

A defendant is not required to testify. The fact that Mr. Brown has not personally addressed you cannot be used to support a finding that the State has met its burden on the question posed by these instructions. Mr. Brown's silence during this sentencing proceeding should not prejudice him in any way.

NO. 5

During this sentencing phase proceeding, the State has the burden of proving to you beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. If the State meets this burden, the death penalty will be imposed.

Mr. Brown has no burden. He is not required to prove the existence of any mitigating circumstance or circumstances.

Mr. Brown is presumed to merit leniency, which would result in a sentence of life in prison without possibility of release or parole. This presumption continues throughout the entire proceeding unless, during your deliberations, you find unanimously that it has been overcome by the evidence beyond a reasonable doubt. A reasonable doubt is a doubt for which a reason can be given, and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence.

NO. 6

The question you are required to answer is as follows: Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

If you unanimously answer "yes," the sentence will be death.

On the other hand, if any one or more of you does not answer "Yes," or if you unanimously answer "No," the sentence will be life imprisonment without possibility of release or parole.

NO. 7

A mitigating circumstances is a fact about either the offense or about the defendant which is fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.

The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including, but not limited to, the following:

Whether the murder was committed while the defendant was under the influence of extreme mental disturbance; or

Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect.

NO. 8

Life imprisonment without the possibility of release or parole means that:

(1) The individual shall not have his sentence suspended, deferred or commuted by any judicial officer;

(2) The Indeterminate Sentencing Review Board or its successor shall never parole the individual or reduce the period of confinement;

(3) The person shall not be released as a result of any type of good time calculation; and

(4) The Department of Corrections, or any executive official, shall not permit the person to participate in any release or furlough program.

NO. 9

Because you have found the defendant, Cal Coburn Brown, guilty of aggravated first degree murder, you have been reconvened for this special sentencing proceeding.

It is the foreperson's duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon the question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions and the sentencing verdict form.

You must answer one question. All twelve of you must agree before you answer the question "yes". If all twelve of you have so agreed, fill in the answer to the question in the verdict form to express your decision.

On the other hand, if any one or more of you does not answer "yes," or if you unanimously answer "no," fill in the answer to the question in the appropriate place on the verdict form. When you have filled in the answer called for by the verdict form, the foreperson will sign it and notify the bailiff who will conduct you into court to declare your verdict.

/s/Judge Ricardo S. Martinez Dec 22, 1993

FILED

DEC 27 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
Plaintiff,	)	NO. 91-1-03233-1
v.	)	VERDICT FORM
CAL COBURN BROWN,	)	
Defendant.	)	

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

ANSWER: [YES] "Yes" (in which case the defendant shall be sentenced to death).

[___] "Unable to Unanimously Agree" (in which case the defendant shall be sentenced to life imprisonment without possibility of parole).

[___] "No" (in which case the defendant shall be sentenced to life imprisonment without possibility of parole).

/s/ _____

FOREPERSON

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
Plaintiff,	)	
v.	)	No. 91-1-03233-1
CAL COBURN BROWN,	)	JUDGMENT AND SENTENCE
Defendant.	)	

THIS MATTER having come on regularly for sentencing on the 28th day of January, 1994, the defendant being present with his attorneys, Terry Mulligan, Kern Cleven and Lin-Marie Hupp; the State being represented by Alfred W. Mathews and Theresa Fricke, Senior Deputy Prosecuting Attorneys for King County, Washington, and the defendant having previously been convicted at jury trial of the crime of Premeditated Murder in the First Degree with Aggravating Circumstances, contrary to RCW 9A.32.030(1)(a), RCW 10.95.020(7), RCW 10.95.020(9)(a)(b)(d); Premeditated Murder in the First Degree contrary to RCW 9A.32.030(1)(a), and the lesser included crime of Murder in the First Degree (Felony), committed by alternative means contrary to RCW 9A.32.030(1)(c)(1), (1)(c)(2), (1)(c)(5), as charged in the Information filed on 11 June 1991, and the court having afforded counsel the right to speak, and the defendant having been afforded the opportunity to make a statement in mitigation of punishment to the jury empaneled herein in the penalty portion of the trial, and the defendant also having been given the opportunity to allocate to the jury empaneled in the penalty portion of the trial, and the jury having thereafter

unanimously answered in the affirmative the following question pursuant to RCW 10.95.060(4):

> Having in mind the crime of which the defendant has been found guilty are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

And the defendant having been afforded the opportunity to make a statement in mitigation of punishment to the court,

NOW, THEREFORE, THE COURT ORDERS, ADJUDGES AND DECREES:

1. The defendant is guilty of the above-listed crimes.

2. Pursuant to RCW 10.95.080(1), on the conviction for Premeditated Murder in the First Degree with Aggravating Circumstances, the defendant shall be, and hereby is sentenced to death.

3. On this date the defendant was advised of his appellate rights and of the time limitations on collateral attack contained in RCW 10.73.090.

4. The court orders the defendant to cooperate with the King County Department of Adult Detention and/or the State Department of Corrections in providing a blood sample for DNA identification analysis. RCW 43.43.754.

5. The defendant is hereby remanded to the custody of the King County Sheriff for detention in the King County Jail until delivered into the custody of officers of the State of Washington, Department of Corrections, for confinement in the

Washington State Penitentiary at Walla Walla, Washington.

6. The defendant shall be transported and imprisoned in the Washington State Penitentiary at Walla Walla forthwith, but in no event later than ten (10) days from the entry of this Order pursuant to RCW 10.95.170.

DONE IN OPEN COURT this 28 day of January, 1994.

/s/ Ricardo S. Martinez

JUDGE RICARDO S. MARTINEZ

Presented by:

NORM MALENG

King County Prosecuting Attorney

By: /s/ Alfred W. Mathews
ALFRED W. MATHEWS, WSBA ID #9350

By: /s/ Theresa Fricke
THERESA FRICKE, WSBA #16549

Senior Deputy Prosecuting Attorney

Attorneys for Plaintiff

Office WSBA ID #91002

Copy received; approved as to form;

~~Notice of presentation waived~~: kc

By: Terry Mulligan
Terry Mulligan, WSBA #16076
Attorney for Defendant

By/s/ Kern Cleven
KERN CLEVEN
Attorney for Defendant

/s/ Lin-Marie Hupp
LIN-MARIE HUPP 16149

***

[Fingerprints, Attestation, And Certificate Omitted
In Printing

***]

CHAPTER 153–HABEAS CORPUS

→ § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of

the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a

factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Wash. Rev. Code 10.95.020

Definition.

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in *RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

Wash. Rev. Code 10.95.030

Sentences for aggravated first degree murder.

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed, under the definition of mental retardation set forth in (a) of this subsection. A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation.

(a) "Mentally retarded" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purposse of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

Wash. Rev. Code 10.95.060

Special sentencing proceeding – Jury instructions – Opening statements – Evidence - - Arguments – Question for jury.

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands

convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

Wash. Rev. Code 10.95.080

When sentence to death or sentence to life imprisonment shall be imposed.

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050 (2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

048

(4)

NO. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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FORMER CAPITAL CASE

QUESTION PRESENTED

In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment.

Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

PARTIES

The petitioner is Jeffrey A. Uttecht, the Superintendent of the Washington State Penitentiary. Mr. Uttecht is the successor in office to John Lambert, who was the respondent-appellee in the Ninth Circuit.

The respondent is Cal Coburn Brown.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT 2

1. The Murder Of Holly Washa 3

2. Application Of The Death Penalty In Washington 4

3. The Selection Of Brown's Jury 5

   a. The Standard For An Impartial Jury In A Capital Case 5

   b. The Prosecution's Challenge Of Mr. Deal 7

4. The State Supreme Court's Opinion 11

5. The Federal Habeas Corpus Proceedings 13

   a. Standards For Granting Habeas Corpus Relief Under 28 U.S.C. § 2254 13

   b. The District Court 15

   c. The Ninth Circuit 16

SUMMARY OF THE ARGUMENT 19

ARGUMENT 22

1. The Ninth Circuit Erred In Failing To Apply The Presumption Of Correctness Under 28 U.S.C. § 2254(e)(1) To The Washington Courts' Determination That Mr. Deal Was Substantially Impaired 22

2. In Light Of The State Court Finding, The Decision To Remove Mr. Deal Was Not Contrary To Or An Unreasonable Application Of Clearly Established Federal Law 26

   a. *Witt* Clearly Established As Federal Law That A Judge May Remove A Juror Who Is Substantially Impaired 26

   b. The State Court Decision That Mr. Deal Was Substantially Impaired Was Not Contrary To Or An Unreasonable Application Of *Witt* 28

3. The State Courts' Decision Was Not Based Upon An Unreasonable Determination Of The Facts In Light Of The Evidence Presented In State Court 32

CONCLUSION 40

TABLE OF AUTHORITIES

Cases

Brown v. Lambert
451 F.3d 946 (9th Cir. 2006) 1

Carey v. Musladin
127 S. Ct. 649 (2006) 30

Darden v. Wainwright
477 U.S. 168 (1986) 23–25, 27, 36

Gomez v. United States
490 U.S. 858 (1989) 34, 35

Gray v. Mississippi
481 U.S. 648 (1987) 17, 29, 30, 31

Holland v. Jackson
542 U.S. 649 (2004) 14

In re the Pers. Restraint of Brown
143 Wash. 2d 431, 21 P.3d 687 (2001) 13

Lavallee v. Delle Rose
410 U.S. 690 (1973) 24

Lockyer v. Andrade
538 U.S. 63 (2003) 14

Marshall v. Lonberger
459 U.S. 422 (1983) 24, 36

Miller v. Fenton
474 U.S. 104 (1985) 35

Miller-El v. Dretke
545 U.S. 231 (2005) 32

Morgan v. Illinois
504 U.S. 719 (1992) 6, 27

Patton v. Yount
467 U.S. 1025 (1984) 34, 35

Rice v. Collins
126 S. Ct. 969 (2006) 14, 15, 32, 35

Rushen v. Spain
464 U.S. 114 (1983) 35

Smith v. Phillips
455 U.S. 209 (1982) 34

State v. Brown
132 Wash. 2d 529, 940 P.2d 546 (1997) 1

State v. Dodd
120 Wash. 2d 1, 838 P.2d 86 (1992) 8

State v. Kincaid
103 Wash. 2d 304, 692 P.2d 823 (1985) 4

Strickland v. Washington
466 U.S. 668 (1984) 39

Sumner v. Mata
455 U.S. 591 (1982) 23

United States v. Powell
469 U.S. 57 (1984) 5, 6

Wainwright v. Witt
469 U.S. 412 (1985) 5–7, 19, 21–28, 30, 33–35, 38–39

Williams v. Taylor
529 U.S. 362 (2000) 13, 14, 31

Witherspoon v. Illinois
391 U.S. 510 (1968) 7, 21, 27

Woodford v. Visciotti
537 U.S. 19 (2002) 31

Yarborough v. Gentry
540 U.S. 1 (2003) 31

Constitutional Provisions

U.S. Const. amend. VI 1

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) 1, 2

28 U.S.C. § 2254(d)(1) 13, 14, 20, 26, 29, 31

28 U.S.C. § 2254(d)(2) 13–14, 17, 21–22, 32, 35, 38

28 U.S.C. § 2254(e)(1) 2, 13, 17, 20, 22–23, 26

Wash. Rev. Code § 10.95.020 4

Wash. Rev. Code § 10.95.030 ..... 4, 37

Wash. Rev. Code § 10.95.030(2) 5

Wash. Rev. Code § 10.95.060 4

Wash. Rev. Code § 10.95.060(4) 5, 38

Wash. Rev. Code § 10.95.080(1) 5

Wash. Rev. Code § 10.95.080(2) 5

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006) (Pet. App. 1a–41a). The order of the United States District Court for the Western District of Washington is unpublished. Pet. App. 43a–91a. The Washington Supreme Court's opinion affirming Brown's conviction and sentence on direct appeal is reported at *State v. Brown*, 132 Wash. 2d 529, 940 P.2d 546 (1997) (Pet. App. 92a–221a).

JURISDICTION

The court of appeals first entered its opinion on December 8, 2005. Pet. App. 1a. The court entered an amended opinion, and denied a timely petition for rehearing en banc, on June 19, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The sixth amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

28 U.S.C. § 2254(e)(1) provides:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

STATEMENT

Respondent Brown was convicted of aggravated first degree murder by a jury and sentenced to death. During jury selection, the trial court dismissed a juror because his answers during voir dire persuaded the judge that the juror's views about the death penalty would prevent or substantially impair the juror from faithfully and

impartially applying the law. The Ninth Circuit Court of Appeals ruled that the trial court erred in removing the juror and granted Brown's petition for a writ of habeas corpus, vacating his death sentence.

1. The Murder Of Holly Washa

In 1991, Brown abducted Holly Washa at knife point as she was driving out of the parking lot of her workplace. Pet. App. 97a. After stealing her money, Brown handcuffed her and took her back to his room at a local area motel. Pet. App. 97a–98a. Over the course of two days, Brown repeatedly raped and tortured Washa while she was bound and gagged in the motel room. Pet. App. 98a–99a. Brown whipped her, penetrated her vaginally and anally with an aftershave lotion bottle, held a hot hair dryer close to her vagina, breasts, and stomach, and shocked her by using an electric extension cord with the end cut off. Pet. App. 98a–99a. Brown later described these acts as torture. Pet. App. 99a–100a.

Brown finally left the motel for the airport to fly to California. Pet. App. 100a. Brown handcuffed Washa and forced her into the trunk of his car. He drove to the airport where he cut her throat and stabbed her in the chest to avoid leaving a witness to his crimes. Pet. App. 100a. Brown left Washa's body in the trunk of the car. Brown was arrested a few days later in California in the midst of raping, torturing, and attempting to kill another woman. Brown confessed in detail to the murder of Washa.

2. Application Of The Death Penalty In Washington

Brown was charged with the aggravated first degree murder of Holly Washa, and the prosecution filed a notice of intent to seek the death penalty. Pet. App. 104a–05a. Washington law defines aggravated first degree murder as premeditated first degree murder with one or more statutory aggravating factors. Wash. Rev. Code § 10.95.020 (J.A. 163–65). The aggravating factors in this case were that Brown committed the murder to conceal the commissions of his crimes or identity, and that he committed the murder in the course of or in furtherance of the crimes of rape, robbery, and kidnapping.

Washington law provides only two possible sentences for a conviction of aggravated first degree murder—death, or life imprisonment without parole. Wash. Rev. Code § 10.95.030 (J.A. 166–67). When the prosecution files notice of intent to seek the death penalty, the trial is bifurcated. *State v. Kincaid*, 103 Wash. 2d 304, 310, 692 P.2d 823 (1985). In the guilt phase, the jury determines whether the defendant is guilty of premeditated first degree murder and whether one or more of the statutory aggravating circumstances exist. *Id.* In the penalty phase, the jury determines whether there are not sufficient mitigating circumstances to merit leniency. *Id.*; Wash. Rev. Code § 10.95.060 (J.A. 168–69). The penalty phase jury deliberates upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not

sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code § 10.95.060(4) (J.A. 169).

The verdict must be unanimous in order to answer the question in the affirmative. Wash. Rev. Code § 10.95.060(4) (J.A. 169). If the jury answers in the affirmative, the defendant is sentenced to death. Wash. Rev. Code § 10.95.080(1) (J.A. 170); Wash. Rev. Code § 10.95.030(2) (J.A. 166–67). If the jury answers the question in the negative, or if the jury is unable to unanimously agree on the answer, the defendant shall be sentenced to life imprisonment without parole. Wash. Rev. Code § 10.95.080(2) (J.A. 170); *see also* J.A. 154. Thus, if one juror is unable or unwilling to vote for a death sentence, the sentence will be life imprisonment without parole.

3. The Selection Of Brown's Jury

Judge Ricardo S. Martinez presided over the trial. Pet. App. 105a. Jury selection took seventeen judicial days. J.A. 123–44. Since it was a capital case, the questionnaires filled out by the prospective jurors included questions regarding their views on the death penalty, and counsel for the prosecution and defense were allowed to ask about the death penalty during voir dire. Pet. App. 160a.

a. The Standard For An Impartial Jury In A Capital Case

An impartial jury is composed of "jurors who will conscientiously apply the law and find the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). "Jurors . . . take an oath to follow the law as charged, and they are expected to follow it." *United States v. Powell*, 469 U.S. 57, 66 (1984). For this reason,

"trials generally begin with voir dire, by judge or counsel, seeking to identify those jurors who for whatever reason may be unwilling or unable to follow the law and render an impartial verdict on the facts and the evidence." *Powell*, 469 U.S. at 66–67.

In a capital case, a juror's views about the death penalty may prevent the juror from being impartial and following the law. Thus, the state may exclude jurors opposed to capital punishment because "those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Witt*, 469 U.S. at 423. Accordingly, the judge must exclude a prospective juror where "the juror's views [regarding the death penalty] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). On the other hand, "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Such a juror must also be dismissed.

Whether a juror is substantially impaired is an issue of fact. *Witt*, 469 U.S. at 429. The judge need not determine by unmistakable clarity that the juror would automatically vote for or against the death penalty. *Id.* at 424. Rather, the standard requires only a showing that the juror is substantially impaired. *Id.* The trial judge's determination that a particular juror is substantially impaired is entitled to deference, because the

"finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 469 U.S. at 428.

b. The Prosecution's Challenge Of Mr. Deal

During voir dire, there was a dispute about the proper standard for disqualifying jurors based on their views regarding the death penalty. Defense counsel argued that the trial court should apply the standard from *Witherspoon v. Illinois*, 391 U.S. 510 (1968), which required the court to determine whether the prospective juror would automatically vote against the death penalty. J.A. 7–8. The prosecution argued the court should apply the "substantial impairment" standard from *Witt*. J.A. 8. Judge Martinez informed counsel that, in reviewing any challenge for cause, he would apply the "substantial impairment" standard set forth in *Witt*. J.A. 8–9. Judge Martinez also explained to counsel that they should indicate if they agreed on a particular challenge but, if they did not, he would allow further inquiry to resolve the dispute. J.A. 26–27.

The prosecution challenged twelve jurors for cause based upon their views on the death penalty. J.A. 127–40.[1] Defense counsel objected to seven of those twelve challenges. Judge Martinez sustained defense counsel's objection as to five of the jurors and overruled the objection as to the other two. *See* J.A. 127–40. Where the defense objected, Judge Martinez

[1] The parties also exercised peremptory challenges. The prosecution had two unused peremptory challenges at the conclusion of jury selection. J.A. 122.

expressed for the record his determination as to whether the juror was substantially impaired. *See, e.g.*, J.A. 37–39, 54–56, 97–100, 117–21. The prosecution challenged one juror because he would automatically vote for the death penalty, and Judge Martinez dismissed that juror. J.A. 133 (Juror Reynoso). Defense counsel did not object to the removal of the other five jurors challenged by the prosecution, including Richard Deal.

In his questionnaire, Mr. Deal stated that he was "in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." J.A. 69. When asked by defense counsel about his general feelings about the death penalty, Mr. Deal stated: "I do believe in the death penalty in severe situations." J.A. 58. Mr. Deal said that an example of a severe situation was "the young man . . . that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty."[2] J.A. 58–59. Defense counsel asked whether the fact that the defendant wanted to die had "any kind of bearing on your idea that the death penalty was appropriate in his case?" J.A. 59. Mr. Deal responded: "I believe that it was in that case." J.A. 59. Mr. Deal was asked about the imposition of the death penalty in the situation where the defendant did not want to die. Mr. Deal responded:

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[2] Mr. Deal was referring to Wesley Allan Dodd, a serial molester and killer of children, who pled guilty to aggravated murder and who waived all challenges to his sentence of death. *State v. Dodd*, 120 Wash. 2d 1, 838 P.2d 86 (1992).

> "It would have to be a severe case. I guess I can't put a real line where that might be, but there are a lot of cases that I don't think it's where people would—" J.A. 59.

Mr. Deal was not aware that in Washington there were only two penalties for aggravated first degree murder—life in prison without the possibility of parole and the death penalty. J.A. 61. Mr. Deal learned of this fact on the day of his voir dire. J.A. 71. After asking Mr. Deal several questions about life imprisonment without parole (J.A. 60–62), defense counsel asked whether Mr. Deal "could consider both options?" J.A. 62. Mr. Deal responded: "Yes, I could." J.A. 62. However, immediately after this response he was asked "why you think the death penalty is appropriate, what purpose it serves[?]" J.A. 62. Mr. Deal responded:

> "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62.

Defense counsel once again asked if Mr. Deal could consider both possible sentences, and he responded: "I believe so, yes." J.A. 62. Defense counsel then referred to Mr. Deal's questionnaire where he stated that the death penalty should be imposed "if somebody had been killed and it had been proven to you that they would kill again" (J.A. 62) and asked if Mr. Deal would be "frustrated" if he did not hear evidence in the penalty phase about whether Brown would kill again. J.A. 63. Mr. Deal responded: "I'm not sure." J.A. 63.

Referring to Mr. Deal's questionnaire, the prosecutor asked whether Mr. Deal "would . . . still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us[.]" J.A. 69–70. Mr. Deal responded:

> "A I would have to know the, I'm at a loss for the words here.
>
> "Q You can ask me any questions, too, if you need some clarification.
>
> "A I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70.

The prosecutor asked Mr. Deal if he would "find it difficult to vote for the death penalty given a situation where he couldn't kill again?" J.A. 71. Mr. Deal responded: "I think I made that statement [in my questionnaire] more under [sic] assumption that a person could be paroled." J.A. 71.

The prosecutor asked Mr. Deal whether he would be willing to vote for the death penalty in light of the fact that the alternative sentence would be life without the possibility of parole. J.A. 71–72. Mr. Deal said:

> "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." J.A. 72.

The prosecutor asked again if the "idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?" J.A. 72. Mr. Deal responded:

> "I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure." J.A. 72–73.

The prosecutor tried once again and asked Mr. Deal, in the situation where there is no parole, if he could consider the death penalty. J.A. 73. Mr. Deal said: "I could consider it, yes." J.A. 73. When asked if he could impose it, Mr. Deal said: "I could if I was convinced that was the appropriate measure." J.A. 73.

The prosecutor challenged Mr. Deal for cause, arguing Mr. Deal's statements showed he could impose the death penalty only if the defendant had killed and would be in a position to kill again. J.A. 75. The prosecutor argued Mr. Deal had not said anything to overcome his idea that a defendant must be able to kill again. J.A. 75. In response to the prosecutor's challenge, defense counsel said: "We have no objection." J.A. 75. Judge Martinez excused Mr. Deal. J.A. 75. Although Brown sought reconsideration of the decision to remove another juror (J.A. 101–14), Brown did not seek reconsideration of the decision to excuse Mr. Deal. Brown was subsequently convicted of aggravated first degree murder and sentenced to death.

4. The State Supreme Court's Opinion

On direct review, the Washington Supreme Court affirmed Judge Martinez's decision to remove Mr. Deal. Pet. App. 173a. The court began by explaining that "[t]he standard for ruling on

challenges for cause in a death penalty case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror according to instructions and the oath taken by jurors." Pet. App. 171a (citing *Witt*, 469 U.S. at 424). The court also stated that it must give "deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially." Pet. App. 171a. This is because the "trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial." Pet. App. 171a. Quoting this Court, the Washington Supreme Court recognized "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. . . ." Pet. App. 171a (quoting *Witt*, 469 U.S. at 428 n.9 (quoting *Reynolds v. United States*, 98 U.S. 145, 156–57 (1878))).

Applying these standards, the Washington Supreme Court concluded Judge Martinez properly exercised his discretion in removing Mr. Deal. Pet. App. 173a. The court noted that Brown did not object at trial to the State's challenge of Richard Deal for cause, and explained that "[Mr. Deal] indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. In the conclusion of the opinion, the Washington Supreme Court determined the trial judge properly excused Mr. Deal because his "views would have prevented or substantially impaired [his] ability to follow the

court's instructions and abide by [his] oath[] as [a] juror[]." Pet. App. 208a.

The Washington Supreme Court affirmed Brown's conviction and sentence, and subsequently denied his personal restraint petition. *In re the Pers. Restraint of Brown*, 143 Wash. 2d 431, 21 P.3d 687 (2001).[3]

5. The Federal Habeas Corpus Proceedings

Brown filed his current habeas corpus petition alleging, among other things, that the trial judge improperly removed Mr. Deal as a juror.

a. Standards For Granting Habeas Corpus Relief Under 28 U.S.C. § 2254

The Antiterrorism And Effective Death Penalty Act (AEDPA) limits the power of federal courts to grant habeas relief to state prisoners. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). In any review under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A federal court may not grant relief on a claim adjudicated on the merits in state court unless the applicant satisfies the conditions in § 2254(d)(1) or (2). Under 28 U.S.C. § 2254(d)(1), an applicant must prove that the state court decision was "contrary to, or involved an unreasonable

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[3] Brown's personal restraint petition did not challenge the decision to remove Mr. Deal as a juror.

application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." The "contrary to . . . clearly established Federal law" standard of 28 U.S.C. § 2254(d)(1) allows relief only if the "state court arrives at a conclusion opposite to that reached by this Court on a question of law," or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams*, 529 U.S. at 405. "[T]he state court's decision must be substantially different from the relevant precedent of this Court." *Id.* The "unreasonable application of [] clearly established Federal law" standard of 28 U.S.C. § 2254(d)(1) allows relief only if the "'state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (quoting *Williams*, 529 U.S. at 413). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Even "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* To obtain relief, the decision must be objectively unreasonable. *Id.* at 75–76.

Under § 2254(d)(2), an applicant must establish that the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." That reasonable minds might disagree about the correct resolution of a factual issue is not sufficient. *Rice v.*

Collins, 126 S. Ct. 969, 976 (2006). The applicant must show the state court determination of the facts was not only erroneous, but objectively unreasonable. *Id.* at 974–76.

b. The District Court

In addressing the removal of Mr. Deal, the district court explained that the "determination as to individual juror bias in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness," and that a "petitioner must rebut such a finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)." Pet. App. 73a–74a.

In reviewing the record, the district court stated that Mr. Deal "indicated that the death penalty was appropriate in severe situations, such as when a person is, would be incorrigible and would reviolate if released." Pet. App. 77a (citation omitted; internal quotation marks omitted). Elsewhere, Mr. Deal "indicated that he could consider the options of life without parole and death, and could vote for a death sentence if he was convinced that was the appropriate measure." Pet. 77a (internal quotation marks omitted). However, the district court pointed out that "Mr. Deal also indicated some confusion about the impact of a life sentence without parole and the standard of proof. Mr. Deal stated that he would only impose the death penalty if someone could kill again on parole . . . ." Pet. App. 77a.

The district court concluded that the state court decision to remove Mr. Deal was "not contrary to, or an unreasonable application of, clearly

established federal law as established by the Supreme Court." Pet. App. 78a. The district court held that both "the trial court in excusing the jurors, and the Washington Supreme Court is [sic] addressing Petitioner's claim of improper dismissal, applied [*Witt v.*] *Wainwright*'s standard." Pet. App. 78a–79a. And the court held that there was "sufficient evidence to establish that each juror's views would 'prevent or substantially impair' his or her ability to carry out the duties imposed on jurors," and that the state court decision "was not an unreasonable determination of the facts as presented in the state court proceeding." Pet. 79a.

c. The Ninth Circuit

Brown appealed to the Ninth Circuit, which granted relief as to his sentence, concluding the state trial court erred by removing Mr. Deal as a juror. The Ninth Circuit's decision rested on three main points. First, the Ninth Circuit held: "Nowhere did the court find that [Mr. Deal][4] would be unable to follow instructions." Pet. App. 13a. The Ninth Circuit found this to be significant because the Washington Supreme Court's decision "found that both [Ms. Henderson] and [Ms. Denis][5] were 'substantially impaired' in their ability to perform their duties as jurors [b]ut a similar finding is missing from the state court's discussion of

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[4] The Ninth Circuit decision referred to Mr. Deal as juror Z.

[5] The Ninth Circuit's decision referred to two other jurors who were dismissed from the jury, Ms. Henderson, as Juror Y, and Ms. Denis, as Juror X.

[Mr. Deal]." Pet. App. 13a (citation omitted). Because the Ninth Circuit held that there was no factual finding that Mr. Deal was substantially impaired, it failed to apply the presumption of correctness due factual determinations under 28 U.S.C. § 2254(e)(1).

Second, the Ninth Circuit held that the "Washington Supreme Court in this case *applied the wrong standard* with respect to [Mr. Deal]; it nowhere found that [Mr. Deal] could not follow his oath." Pet. App. 19a–20a n.10. Citing *Gray v. Mississippi*, 481 U.S. 648, 658–59 (1987), the Ninth Circuit stated that, at the time of Brown's trial, it was "clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law." Pet. App. 13a. According to the Ninth Circuit, Judge Martinez granted the prosecutor's challenge to Mr. Deal, but "the prosecutor says nothing about the juror's oath or whether [Mr. Deal] will follow it. Rather, the prosecutor concentrates . . . on the question of whether [Mr. Deal] would be willing to impose the death penalty if the alternative were life without parole." Pet. App. 20a n.10. The Ninth Circuit concluded that "there is nothing whatsoever in [Mr. Deal's] voir dire that lends the least support for the finding—explicit or implicit—that he would not follow his oath." Pet. App. 21a n.10.

Third, the Ninth Circuit concluded that any "finding that [Mr. Deal] was 'substantially impaired' in his ability to follow the law, [] would have been unreasonable," citing 28 U.S.C. § 2254(d)(2), (e)(1). Pet. App. 13a–14a. The court based this conclusion on the transcript where Mr. Deal "stated

unequivocally that he could consider the death penalty as an option if told to do so." Pet. App. 10a. In reaching this conclusion, the Ninth Circuit expressly refused to give any deference to Judge Martinez's ability to observe the demeanor of Mr. Deal. The court held "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." Pet. App. 17a n.8.

The state petitioned for rehearing en banc. The Ninth Circuit denied the petition, but Judge Tallman, joined by four other judges, dissented from the denial of rehearing en banc. According to the dissent, the "panel impermissibly substitutes its own evaluation of the trial judge's discretionary ruling" and "fails to give appropriate AEDPA deference to the determination of the Washington Supreme Court which approved the trial judge's reasonable and more informed approach . . . ." Pet. App. 23a, 24a.

The dissent disagreed with the panel's conclusion that the Washington Supreme Court did not find that Mr. Deal was substantially impaired. The dissent stated: "Whether or not the Washington Supreme Court intoned the magic words, 'substantially impaired,' it affirmed the trial court because of [Mr. Deal's] erroneous belief about when the death penalty should be applied under Washington law." Pet. App. 39a. As a result, the Washington Supreme Court "impliedly determined [Mr. Deal] would be substantially impaired in his duties as a juror to follow the law by holding that he was properly dismissed for cause." Pet. App. 40a. And the dissent stated the court "must afford the same presumption of correctness to the Washington

Supreme Court in reviewing the trial court's factual determination of juror bias." Pet. App. 39a.

In reviewing the transcript, the dissent concluded that Mr. Deal was "confused[.]" Pet. App. 29a. "[Mr. Deal] wavered back and forth between claiming to understand what he was being told about when the Washington capital sentencing law applied, yet he reiterated his erroneous belief that death was applicable only for recidivists." Pet. App. 34a. "The transcript reflects that he seemed easily led by both the prosecution and defense counsel into declaring an understanding that everyone in the courtroom recognized he simply did not have." Pet. App. 34a. Noting that defense counsel did not object to Mr. Deal's removal (Pet. App. 32a), the dissent found "[q]uite clearly those who had the opportunity to watch [Mr. Deal's] testimony, including the trial judge, the prosecution, and defense counsel, both during and after questioning him on voir dire, felt that [Mr. Deal] was properly dismissed for cause." Pet. App. 33a.

SUMMARY OF THE ARGUMENT

Wainwright v. Witt, 469 U.S. 412 (1985), established federal law that allows a trial judge to excuse a juror for cause, if the juror's views on the death penalty would substantially impair the juror's ability to perform the duties of a juror. Whether a particular juror is substantially impaired is a question of fact, answered by the judge's observations of the juror during voir dire. In this case, the trial court applied the *Witt* standard and dismissed Richard Deal from Brown's jury. Applying the same standard, the Washington Supreme Court

affirmed the trial court, expressly holding that Mr. Deal was substantially impaired. The Ninth Circuit's decision reversing the Washington courts is in error.

In a habeas corpus action, 28 U.S.C. § 2254(e)(1) requires the federal courts to apply a presumption of correctness to state court findings of fact that may only be overcome by clear and convincing evidence. The Ninth Circuit refused to apply this presumption of correctness to the Washington courts' decisions because the circuit court believed there was no express finding that Mr. Deal could not follow his oath. The Ninth Circuit's decision is incorrect. The Washington Supreme Court expressly held that Mr. Deal was substantially impaired. Moreover, § 2254(e)(1) does not require the state courts to enter express findings of fact. The presumption applies if there is a transcript of the voir dire showing that the potential juror was questioned in the presence of counsel and the judge; at the end of the colloquy, the prosecution challenged the juror; and the challenge was sustained when the judge dismissed the juror. This is exactly how Mr. Deal was dismissed. The decisions of the Washington courts are entitled to the presumption of correctness, and Brown did not come forward with clear and convincing evidence to overcome the presumption.

Under 28 U.S.C. § 2254(d)(1), a federal court cannot grant a habeas corpus petition unless the applicant establishes that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. The substantial

impairment standard in *Witt* is clearly established law, which was applied by the Washington courts. The Ninth Circuit concluded that the state courts applied the wrong standard because they did not state that Mr. Deal would be unable to follow his oath. However, it was the Ninth Circuit—not the state courts—that applied the wrong standard. *Witt* clarified *Witherspoon v. Illinois*, 391 U.S. 510 (1968), holding that the proper standard was the substantial impairment standard and not whether a juror would automatically vote against imposing the death penalty. Brown has failed to establish that the state court decisions were contrary to, or involved an unreasonable application of, *Witt*.

Under 28 U.S.C. § 2254(d)(2), a federal court cannot grant a habeas corpus petition unless the petitioner establishes that the state court decision was based on an unreasonable determination of the facts. This is a substantial burden. The petitioner must establish that the state court decision was objectively unreasonable. The Ninth Circuit held that the state courts' decisions were unreasonable because Mr. Deal stated that he could consider and apply the death penalty. The circuit court refused to grant any deference to the trial judge's ability to observe the demeanor and evaluate the credibility of the potential juror during voir dire, because it stated that the transcript was clear. The Ninth Circuit's decision is incorrect. The test for impairment is not a catechism based on the answer to one question. Rather, it is based on the trial judge's views of the entire voir dire. Despite clear words in a transcript, a potential juror's demeanor may persuade a trial judge that the juror is impaired. There is no basis

for the Ninth Circuit's decision not to grant deference to the trial judge.

By failing to grant deference to the trial court judge, the Ninth Circuit substituted its judgment for that of the trial court. But under a proper application of § 2254(d)(2), the decision to dismiss Mr. Deal was not objectively unreasonable. Although Mr. Deal said he could impose the death penalty in an appropriate case, he repeatedly stated during voir dire that he believed the death penalty was appropriate if the defendant had killed and would be in a position to kill again. But this is not the standard Washington uses in imposing the death penalty. In light of these answers, it was reasonable for the trial court to conclude that Mr. Deal was substantially impaired.

ARGUMENT

1. The Ninth Circuit Erred In Failing To Apply The Presumption Of Correctness Under 28 U.S.C. § 2254(e)(1) To The Washington Courts' Determination That Mr. Deal Was Substantially Impaired

28 U.S.C. § 2254(e)(1) requires that, when federal courts consider a habeas corpus petition, "a determination of a factual issue made by a State court shall be presumed to be correct." This statutory presumption of correctness is now unconditional. Section 2254(e)(1) eliminated the exceptions to the presumption of correctness listed in former 28 U.S.C. § 2254(d), including the exception that allowed the federal court to disregard a state court finding of fact if the finding was not supported

by the record. 28 U.S.C. § 2254(e)(1). This "presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact . . . ." *Sumner v. Mata*, 455 U.S. 591, 592–93 (1982). The question of juror impartiality is necessarily one of fact, and this Court has held that a finding that a juror is substantially impaired because of his or her views regarding the death penalty "is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254." *Darden v. Wainwright*, 477 U.S. 168, 175 (1986); *Witt*, 469 U.S. at 429 (the statutory presumption of correctness "applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause").

The Ninth Circuit circumvented the mandatory requirements of § 2254(e)(1) by concluding the state courts made no finding that Mr. Deal was substantially impaired. Pet. App. 13a, 20a n.10. The Ninth Circuit's decision is in error for two reasons. First, the Washington Supreme Court did expressly find Mr. Deal's views on the death penalty "would have prevented or substantially impaired [his] ability to follow the court's instructions and abide by [his] oath[] as [a] juror[]." Pet. App. 208a. Second, the trial judge necessarily, albeit implicitly, determined Mr. Deal was substantially impaired when the judge excused Mr. Deal from the jury. The presumption of correctness required by § 2254(e)(1) is not limited to express findings of the trial court. The presumption applies to the express and implicit findings of the state trial and appellate courts. The fact that the court grants or denies the relief sought constitutes a

determination of fact that is subject to the statutory presumption of correctness.

The Court explained this principle in *Marshall v. Lonberger*, 459 U.S. 422 (1983), in which the Court discussed *Lavallee v. Delle Rose*, 410 U.S. 690 (1973). In *Lavallee*, "the trial judge likewise failed to make express findings as to the defendant's credibility." *Marshall*, 459 U.S. at 433. "[*Lavallee*] held that because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony, its failure to grant relief was tantamount to an express finding against the credibility of the defendant." *Marshall*, 459 U.S. at 433.

Likewise, in *Witt*, this Court rejected the claim that the statutory presumption of correctness applies only to express findings. In *Witt*, the trial court did not make an express finding that a juror was substantially impaired. The defendant argued the presumption of correctness did not apply because "this conclusion was not evidenced by a written finding, written opinion, or other reliable and adequate written indicia." *Witt*, 469 U.S. at 430 (internal quotation marks omitted). This Court disagreed, holding that the presumption of correctness applied if there was a "transcript of the voir dire [showing that the juror] was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked [the juror] to step down." *Witt*, 469 U.S. at 430 (internal quotation marks omitted). The same was true in *Darden*. Despite the lack of an express

finding that the juror was impaired, the Court held that the "trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness . . . ." *Darden*, 477 U.S. at 175. And, as in *Witt*, the Court looked to the transcript of the voir dire proceedings to make its analysis. *Id.* at 176–78.

The state courts necessarily determined the factual issue of Mr. Deal's substantial impairment when the trial judge removed him as a juror, and the Washington Supreme Court affirmed his removal on direct appeal. The state courts expressly applied the substantial impairment standard in reviewing the prosecution's challenge to Mr. Deal. Pet. App. 160a–173a; J.A. 7–9. Applying this standard, the state courts decided Mr. Deal should be excused. This decision was tantamount to a determination that Mr. Deal was substantially impaired.

It is also significant that Brown's defense counsel did not object when the prosecutor challenged Mr. Deal. When defense counsel did object to the prosecutor's challenge, Judge Martinez made an express finding of substantial impairment on the record. *See, e.g.*, J.A. 54–56, 97–100, 117–18. However, there was no need to make such an express finding in absence of an objection. As the Court explained in *Witt*, "[n]or do we think under the circumstances that the judge was required to announce for the record his conclusion that [the juror] was biased, or his reasoning. The finding is evident from the record." *Witt*, 469 U.S. at 430. This Court found it "noteworthy that [the trial court] was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to

[the juror's] recusal, or to attempt rehabilitation." *Witt*, 469 U.S. at 430–31.

The statutory presumption of correctness applies unless the petitioner rebuts it "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Brown presented no clear and convincing evidence to rebut the state courts' finding that Mr. Deal was substantially impaired. Selected voir dire answers by Mr. Deal, considered out of context and without benefit of observing his demeanor, fall far short of clear and convincing evidence. Brown has offered nothing more.

2. In Light Of The State Court Finding, The Decision To Remove Mr. Deal Was Not Contrary To Or An Unreasonable Application Of Clearly Established Federal Law

28 U.S.C. § 2254(d)(1) authorizes the federal courts to grant a habeas corpus petition only if the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."

a. *Witt* Clearly Established As Federal Law That A Judge May Remove A Juror Who Is Substantially Impaired

This Court's holding in *Witt* clearly established the federal law at issue in this case. *Witt* held that a judge properly dismisses a prospective juror where "the juror's views would

'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The Court has repeated this standard in subsequent decisions. *Darden*, 477 U.S. at 175; *Morgan v. Illinois*, 504 U.S. 719, 728 (1992).

Witt clarified the limited holding in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witt* explained that *Witherspoon* "focused only on circumstances under which prospective jurors could *not* be excluded; under *Witherspoon's* facts it was unnecessary to decide when they *could* be excluded." *Witt*, 469 U.S. at 422. Some lower courts had read the dicta in *Witherspoon* to permit a judge to disqualify a potential juror in a capital case "only if he or she would automatically vote against the death penalty, and even then this state of mind must be unambiguous, or unmistakably clear." *Id.* at 419 (internal quotation marks omitted). *Witt* "dispens[ed] with *Witherspoon*'s reference to 'automatic' decisionmaking" and "reaffirm[ed] the [substantial impairment standard] from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." *Id.* at 424.

Even though a juror's views may not make the juror "automatically vote against the death penalty," those views may still prevent or substantially impair the juror from being impartial and following the law. "[W]hether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to

follow the statutory scheme and truthfully answer the questions put by the trial judge." *Witt*, 469 U.S. at 422. The court may exclude jurors who "might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Id.* at 423.

Witt also held that the standard for juror disqualification in a capital case "does not require that a juror's bias be proved with unmistakable clarity." *Witt*, 469 U.S. at 424 (internal quotation marks omitted). The Court reasoned that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear . . . ." *Id.* at 424–25 (internal quotation marks omitted). Instead of unmistakable clarity, *Witt* held that a potential juror may properly be dismissed where "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426.

b. The State Court Decision That Mr. Deal Was Substantially Impaired Was Not Contrary To Or An Unreasonable Application Of *Witt*

The decisions of the Washington courts to dismiss Mr. Deal from the jury were not contrary to or an unreasonable application of clearly established federal law, because the state courts applied the standard in *Witt* and found that Mr. Deal was

substantially impaired. Thus, Brown cannot obtain habeas corpus relief under 28 U.S.C. § 2254(d)(1).

The Ninth Circuit concluded that "excusing [Mr. Deal] for cause was directly contrary to Supreme Court precedent . . . ." Pet. App. 19a. Relying on *Gray v. Mississippi*, 481 U.S. 648, 658–59 (1987), the court stated that it was "clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law." Pet. App. 13a. The Ninth Circuit determined the state court "*applied the wrong standard*" because the state court "nowhere found that [Mr. Deal] could not follow his oath." Pet. App. 19a–20a n.10.

The Ninth Circuit's analysis is flawed for four reasons. First, the Washington Supreme Court did find Mr. Deal was substantially impaired in following his oath as a juror. Pet. App. 208a.

Second, the state courts stated that they were applying the correct standard. Judge Martinez expressly stated he was applying the "substantial impairment" standard established in *Witt* for reviewing the challenges for cause. J.A. 7–9; *see also* J.A. 56, 99–100, 117–18 (judge finding jurors to be substantially impaired). The Washington Supreme Court also expressly stated it was reviewing the challenges for cause under the *Witt* substantial impairment standard. Pet. App. 160a–73a, 208a. There is no evidence the state courts applied the wrong standard in this case.

Third, it is the Ninth Circuit—not the state courts—that applied the wrong standard. According to the Ninth Circuit, a juror may not be disqualified

unless the juror states that he or she "would not follow the law." Pet. App. 13a. The Ninth Circuit essentially reverted to the dicta in *Witherspoon*, which led some lower courts to incorrectly conclude that a juror could be disqualified only if he or she would automatically vote against the death penalty. *Witt* expressly "dispens[ed] with *Witherspoon*'s reference to 'automatic' decisionmaking . . . ." *Witt*, 469 U.S. at 424. Thus, the standard is not whether Mr. Deal said he could follow his oath. The standard is whether Mr. Deal's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* (internal quotation marks omitted).

Fourth, the Ninth Circuit's reliance on *Gray* is misplaced. *Gray* did not alter the law clearly established by *Witt*. The phrase "clearly established Federal law" in § 2254(d)(1) means the holdings of this Court. *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006). *Gray* explained that *Witt* "clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment [holding] that the relevant inquiry is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Gray*, 481 U.S. at 658 (internal quotation marks omitted). And *Gray* stated that there is "no need to delve again into the intricacies of that standard." *Id.* The sole issue before the Court in *Gray* was whether the erroneous removal of the juror was subject to a harmless error analysis. *Id.* at 657.

Moreover, the decisions of the state courts are not contrary to *Gray*. Under the "contrary to . . . clearly established Federal law" standard of § 2254(d)(1), a petitioner is entitled to relief only if the "state court arrives at a conclusion opposite to that reached by this Court on a question of law," or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams*, 529 U.S. at 405. Here, the state courts did not arrive at a conclusion opposite to that reached by this Court on a question of law, and the state court decision did not involve facts materially indistinguishable from those in *Gray*. Unlike this case, *Gray* did not involve a state court finding that the removed juror was substantially impaired. *Gray*, 481 U.S. at 653–55. On the contrary, Gray objected to the removal of the juror, and the Mississippi state court explicitly found the juror was not impaired and could impose the death penalty. *Id.* Thus, the facts in the present case were not "materially indistinguishable" from those in *Gray*.

The Ninth Circuit failed to give the state court decisions the deference required by AEDPA. AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Brown has not shown that the state court decision was erroneous. The Ninth Circuit's conclusion that the state courts not only erred, but reached a decision contrary to Supreme Court precedent, gave too little deference to the state court adjudication of this claim. *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003).

3. The State Courts' Decision Was Not Based Upon An Unreasonable Determination Of The Facts In Light Of The Evidence Presented In State Court

After incorrectly ruling that the Washington courts did not find that Mr. Deal was substantially impaired, the Ninth Circuit went on to state that any "finding that [Mr. Deal] was substantially impaired in his ability to follow the law . . . would have been unreasonable," citing 28 U.S.C. § 2254(d)(2). Pet. App. 13a–14a (internal quotation marks omitted). To obtain relief under 28 U.S.C. § 2254(d)(2), a petitioner must establish that the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Under this latter standard, it is not enough to demonstrate that reasonable minds might disagree about the correct resolution of a factual issue. *Rice v. Collins*, 126 S. Ct. 969, 976 (2006). The applicant must show the state court determination of the facts was not only erroneous, but objectively unreasonable. *Id.* at 974–76. To be an unreasonable determination of the facts, the evidence must be "too powerful to conclude anything but" the contrary of that reached by the state court. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

The Ninth Circuit did not discuss or apply the heightened standard required by § 2254(d)(2) in the decision below. Instead, the circuit court substituted its judgment for that of the state courts. The Ninth Circuit concluded that Mr. Deal was not impaired, because he "stated unequivocally that he could consider the death penalty as an option if told to do

so." Pet. App. 10a. This statement by Mr. Deal is not determinative of whether he was substantially impaired. In *Witt*, this Court stated that the "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424. In fact, "[r]elevant *voir dire* questions addressed to this issue need not be framed exclusively in the language of the controlling appellate opinion . . . ." *Id.* at 433–34. Yet the decision below reduces juror disqualification to a catechism. If a potential juror states he or she can consider the death penalty, the Ninth Circuit concludes that the juror cannot be impaired—regardless of what else the juror says during voir dire. Rather than a catechism, this Court recognized "common sense" tells us and "experience has proved" that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425–26.

Moreover, the Ninth Circuit was able to reach the conclusion that any state court's finding of substantial impairment would be unreasonable only because the circuit court refused to grant any deference to the trial judge's ability to evaluate the demeanor and credibility of potential jurors during voir dire. The Ninth Circuit stated that "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words" (Pet. App. 17a n.8), and the court concluded Mr. Deal's "clear words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary." Pet. App. 17a n.8.

There is no basis for the Ninth Circuit's refusal to grant deference to the trial court's ability to observe and consider juror demeanor. Indeed, it conflicts with the whole concept of voir dire. In order to "detect prejudices . . . the court [] must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." *Gomez v. United States*, 490 U.S. 858, 874–75 (1989). For this reason, "[d]emeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying." *Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984). Indeed, potential jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Witt*, 469 U.S. at 425; *Smith v. Phillips*, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased . . . is difficult, partly because the juror may have an interest in concealing his own bias . . . ."). For this reason, the "manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Witt*, 469 U.S. at 428 n.9 (quoting *Reynolds v. United States*, 98 U.S. 145, 156–57 (1879)).

The trial judge has the singular opportunity to assess each juror's demeanor, inflection, and credibility during the voir dire process, placing that judge in a position far superior to the reviewing courts to determine the "real character" of the

prospective juror's impartiality. *Patton*, 467 U.S. at 1037–38, nn.12 & 14. "The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Id.* at 1039. "It is here that the federal court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty." *Id.* at 1040.[6]

Regardless of voice, facial expressions, body language, or other non-verbal clues, the Ninth Circuit would accept the transcribed words over the observations of the trial judge. Even if a juror had made a statement with clear sarcasm, rolled his eyes, or even shook his head "no" when saying the word "yes," the Ninth Circuit would accept the cold record and disregard the trial judge's observations. But the fact is that "no transcript can recapture the atmosphere of the *voir dire* . . . ." *Gomez*, 490 U.S. at 875.

Even if the Ninth Circuit is correct that Mr. Deal's "clear words" do not alone show bias, this conclusion is not sufficient to establish the state courts' determination of bias was– objectively unreasonable, the standard required by § 2254(d)(2). Unlike the federal court reviewing the transcript, the

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[6] This Court has repeatedly recognized that the trial judge is in a better position than an appellate court to judge demeanor and credibility. *Rice*, 126 S. Ct. at 974–76; *id.* at 977 (Breyer, J., concurring); *Witt*, 469 U.S. at 426; *Rushen v. Spain*, 464 U.S. 114, 120 (1983); *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

trial judge was aided by his assessment of Mr. Deal's demeanor. *Darden*, 477 U.S. at 178. The habeas statute "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall*, 459 U.S. at 434 (citing *United States v. Oregon Med. Soc'y*, 343 U.S. 326, 339–40 (1952)). "In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . ." *Id.* (alterations in original).

The Washington courts' finding that Mr. Deal was substantially impaired is not objectively unreasonable. During the voir dire, when asked if he could consider the death penalty, Mr. Deal said: "I could consider it, yes." J.A. 73. When asked if he could impose it, Mr. Deal said: "I could if I was convinced that was the appropriate measure." J.A. 73. This was the end of the inquiry for the Ninth Circuit. However, when asked when the death penalty would be appropriate, Mr. Deal stated that it would have to be a severe situation where the defendant could kill again. In his questionnaire, Mr. Deal stated that he was "in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." J.A. 69. When asked by Brown's defense counsel why the death penalty was appropriate, Mr. Deal testified:

> "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62.

When the prosecutor asked whether Mr. Deal would "still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us" (J.A. 69–70), Mr. Deal responded:

> "A I would have to know the, I'm at a loss for the words here.
>
> "Q You can ask me any questions, too, if you need some clarification.
>
> "A I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70.

When asked by the prosecutor whether he would be willing to vote for the death penalty in light of the fact that the alternative sentence would be life without the possibility of parole (J.A. 71–72), Mr. Deal said:

> "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." J.A. 72.

In light of these answers and the trial court's ability to evaluate Mr. Deal's demeanor and credibility, it was not unreasonable for Judge Martinez to find that Mr. Deal was substantially impaired. In Washington, the prosecutor need not prove the defendant will get out and kill again. Proof of such a fact is nearly impossible, since the only alternative sentence to death is life without possibility of parole. Wash. Rev. Code § 10.95.030

(J.A. 166–67). Instead of considering whether the defendant may kill again, the jury considers only this statutory question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code 10.95.060(4) (J.A. 169). Because Brown would never be released under Washington law, and Mr. Deal believed the death penalty was appropriate only where the defendant would be released and kill again, it was objectively reasonable to conclude that Mr. Deal was substantially impaired in his ability to vote for the death penalty in this case. Brown has not met his burden to demonstrate that such a finding was unreasonable, as § 2254(d)(2) demands, and the Ninth Circuit erred in concluding otherwise.

It is also significant that Brown's counsel did not object to the prosecutor's challenge of Mr. Deal and, in fact, affirmatively stated that Brown had no objection to Mr. Deal's removal from the jury. In *Witt*, this Court explained that "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims." *Witt*, 469 U.S. at 431 n.11. Had Brown objected, it is likely that the trial judge would have put his reasons for finding Mr. Deal substantially impaired on the record. For example, Brown objected to the dismissal of Ms. Henderson. J.A. 55–56. In rejecting Brown's

challenge to her dismissal, the Ninth Circuit relied upon her demeanor as stated by the trial judge. J.A. 117–18. When asked if she could consider the death penalty, the circuit court stated that Ms. Henderson "crossed her arms, held her hand up . . . and sat back." Pet. App. 9a & n.4 (alteration in original). Because Brown did not object to the prosecutor's challenge to Mr. Deal, and in fact affirmatively stated that Brown had no objection, there was little reason for the trial judge to make any similar observations on the record with respect to Mr. Deal. As the Court observed in *Witt*, a decision to remove a juror is reasonable where "no one in the courtroom questioned the fact that her beliefs prevented her from sitting." *Witt*, 469 U.S. at 435.

In this respect, it is also worth noting that Brown does not claim that counsel provided ineffective assistance in failing to object to Mr. Deal's removal from the jury. Counsel is presumed to have provided reasonably competent representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The courts therefore must presume that, if counsel believed Mr. Deal was not substantially impaired, counsel would have objected to the prosecution's challenge for cause. Because counsel did not object, and Brown has not alleged ineffective assistance of counsel as to the jury selection, the lack of an objection is compelling evidence that the trial judge acted properly by removing Mr. Deal as a juror. A criminal defendant cannot simply forego raising the issue at trial and then ask the federal courts on collateral review to second guess the judgment of the trial court.

CONCLUSION

For the reasons stated herein, the Court should reverse the decision of the Ninth Circuit and remand for further proceedings.

RESPECTFULLY SUBMITTED.

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JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

TABLE OF CONTENTS

		Page
A.	STATEMENT OF FACTS	1
	1. PROCEDURAL HISTORY	1
	2. PROCEEDINGS IN THE TRIAL COURT	1
	3. THE WASHINGTON STATE SUPREME COURT	7
	4. THE CIRCUIT COURT	8
B.	SUMMARY OF THE ARGUMENT	8
C.	ARGUMENT	10
	1. THE PROPER STANDARD OF REVIEW	10
	2. THE WASHINGTON STATE SUPREME COURT'S DECISION WAS AN OBJECTIVELY UNREASONABLE APPLICATION OF *WITT*, *WITHERSPOON* AND *GRAY*	11
	3. THE WASHINGTON STATE TRIAL COURT'S "IMPLICIT FINDING" WAS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN STATE COURT	19
	a. Clearly erroneous findings are addressed by this Court under 28 U.S.C. § 2254(d)(2)	19
	b. To the extent that the trial court made a "finding" that Juror Deal was substantially impaired, it was objectively unreasonable and contrary to the clear and convincing evidence on the record	21

TABLE OF CONTENTS – Continued

Page

4. THE FACT THAT BROWN'S LAWYERS DID NOT OBJECT DOES NOT AID UTTECHT'S ARGUMENTS UNDER UNIQUE ASPECTS OF WASHINGTON LAW 29

5. THE NEED FOR DEFERENCE IN THIS CASE IS NO STRONGER THAN IN ANY OTHER CASE 31

D. CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Adams v. Texas, 448 U.S. 38 (1980) 12, 31

Batson v. Kentucky, 476 U.S. 79 (1986) 29, 30

Bell v. Cone, 535 U.S. 685 (2002) 10

Brown v. Lambert, 451 F.3d 946 (9th Cir. 2006) 1

Buchanan v. Angelone, 522 U.S. 269 (1998) 18

Darden v. Wainwright, 477 U.S. 168 (1986) 21, 31

Deck v. Missouri, 544 U.S. 622 (2005) 28

Gomez v. United States, 490 U.S. 858 (1989) 24

Gray v. Mississippi, 481 U.S. 648 (1987) ..... *passim*

Hennon v. Cooper, 109 F.3d 330 (1997) 27

Herrera v. Collins, 506 U.S. 390 (1993) 28

Marshall v. Lonberger, 459 U.S. 422 (1983) 23

Miller-El v. Cockrell, 537 U.S. 322 (2003) 20, 25, 28

Miller-El v. Dretke, 545 U.S. 231 (2005) 28

Norton v. Spencer, 351 F.3d 1 (1st Cir. 2003) 27

Patton v. Yount, 467 U.S. 1025 (1984) 23

Personal Restraint Petition of Brown, 143 Wn.2d 431, 21 P.3d 687 (2001) 1

Rice v. Collins, 546 U.S. 333 (2006) 20, 26

Skipper v. South Carolina, 476 U.S. 1 (1986) 17

State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984), *appeal after remand*, 104 Wn.2d 844, 710 P.2d 196 (1985) 18

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997) 29

TABLE OF AUTHORITIES – Continued

Page

State v. Beliz, 104 Wn. App. 206, 15 P.3d 683 (2001) 29

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) ...1, 7, 30

State v. Burch, 65 Wn. App. 828, 830 P.2d 357 (1992) 29

State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001) 30

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) 30

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 30

State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000) 30

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995) 15, 18

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000) 30

State v. Knotek, 136 Wn. App. 412, 149 P.3d 676 (2006) 30

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) 29

State v. Littlefair, 129 Wn. App. 330, 119 P.3d 359 (2005) 30

State v. Woods, 143 Wn.2d 561, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001) 30

Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004), *cert. denied*, *Maddox v. Taylor*, 543 U.S. 1038 (2004) 20

Wainwright v. Witt, 469 U.S. 412 (1985).....*passim*

Wiggins v. Smith, 539 U.S. 510 (2003) 19

Williams v. Taylor, 529 U.S. 362 (2000) 11

TABLE OF AUTHORITIES – Continued

Page

Witherspoon v. Illinois, 391 U.S. 510 (1968).....11, 27, 31

Yarborough v. Gentry, 540 U.S. 1 (2003) 25

STATUTES

28 U.S.C. § 2254.....8, 9, 10, 20

RCW 10.95.020.....14, 15

RCW 10.95.060.....14, 15

RCW 10.95.070.....14, 16, 17

RULES

RAP 2.5..... 29

A. STATEMENT OF FACTS

1. PROCEDURAL HISTORY

Cal Coburn Brown was convicted of aggravated first-degree murder and sentenced to death following a jury trial in the King County Superior Court. JA 155. He appealed the judgment to the Washington State Supreme Court and it was affirmed on appeal. *State v. Brown,* 132 Wn.2d 529, 940 P.2d 546 (1997); Pet. App. 92a-221a.[1]

Following exhaustion of the available Washington State remedies, Brown filed a petition for writ of habeas corpus in the United States District Court for the Western District of Washington. After an evidentiary hearing, the District Court issued an order denying the writ and entered judgment against Brown. JA 43a-92a.

On June 19, 2006, a panel of the Ninth Circuit Court of Appeals reversed the District Court and granted the writ. *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006); JA 1a-41a.

2. PROCEEDINGS IN THE TRIAL COURT

Uttecht does not properly describe Juror Deal's voir dire. He variously suggests that it was "ambiguous" or "generic." He also suggests that Juror Deal's comments regarding recidivism were "pivotal" or "central" to his consideration of the death penalty. These characterizations are not accurate. Both the prosecution and defense were

---

[1] Brown also filed a personal restraint petition seeking collateral review of his conviction in the Washington State Supreme Court and it was denied. *Personal Restraint Petition of Brown,* 143 Wn.2d 431, 21 P.3d 687 (2001).

given substantial opportunity to question Juror Deal. The questions were detailed. At the outset, Juror Deal stated he believed in the death penalty in severe situations. Uttecht has not argued that this qualification impaired Juror Deal's ability to consider the death penalty. In Washington, as in most other states, the death penalty is by statute reserved for the most serious homicides. When asked to explain further, Juror Deal indicated he was keeping an open mind. He could not, at that stage of the proceedings, "draw a real line" as to which homicides were the most severe. He opined that someone who was "temporarily insane" might not deserve the death penalty. When asked directly if he would "find it difficult to vote for the death penalty given a situation where he wouldn't kill again," Juror Deal replied, "I would have to give that some thought." The prosecutor asked again: "[C]ould you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?" Juror Deal said unequivocally, "Yes, sir." JA 71-73.

> The relevant verbatim portions of the transcript are as follows:
>
> Defense Counsel: . . . I would like to start off asking you some questions about your feelings about the the death penalty. I want to reinforce what the judge has already told you, which is there are no right or wrong answers . . .

JA 57-58.

> Defense Counsel: Can you give me an idea of what your general feelings about the death penalty are?

> A. I do believe in the death penalty in severe situations . . .

JA 58. Defense counsel and Juror Deal then discussed a specific Washington case where the defendant had indicated he wanted to be put to death. Deal indicated that the death penalty would be appropriate in that situation. JA 59. Defense counsel then asked:

> If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?
>
> A. It would have to be a severe case. I guess I can't put a real line where that might be . . .

Id. Juror Deal indicated that a person who was "temporarily insane" would probably not deserve the death penalty.

> Defense counsel: Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?
>
> A. I did not until this afternoon.
>
> Defense Counsel: That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt. Do you think that you could consider both options?
>
> A. Yes, I could.
>
> Defense Counsel: Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

> A. I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.
>
> Defense Counsel: Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative? [sic]
>
> A. I believe so, yes.

JA 61-62. When asked what he thought about the "frequency of the use of the death penalty in the United States," Juror Deal stated:

> . . . I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.
>
> Defense counsel: It sounds like you're a little more comfortable that it is being used some of the time?
>
> A. Yes.
>
> Defense Counsel: You weren't happy with the time when it wasn't being used at all?
>
> A. I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

JA 63.

The prosecutor first confirmed with Juror Deal that he had stated in his questionnaire that he was in favor of the death penalty. JA 69. Juror Deal acknowledged that he had filled out the questionnaire before he read the juror's handbook. *Id.* The prosecutor noted that Juror Deal had indicated that life in prison would be appropriate if there was proof that the defendant would not kill again. JA 71.

> Prosecuting Attorney: I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?
>
> A. I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.
>
> Prosecuting Attorney: And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?
>
> A. I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.
>
> Prosecuting Attorney: And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty. And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would

never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything. But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A. Yes, sir.

Prosecuting Attorney: So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A. I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Prosecuting Attorney: But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A. I could consider it, yes.

Prosecuting Attorney: Then could you impose it?

A. I could if I was convinced that was the appropriate measure.

JA 71-73.

At the close of questioning, the judge asked: "Counsel, any challenge to this particular juror?" JA 74. The prosecutor moved to exclude Juror Deal for cause. He stated that he was not challenging Juror Deal on his confusion regarding the burden of proof because " . . . I think he would certainly stick with the reasonable doubt standard." JA 75. The prosecutor stated that there was cause for removal because:

> . . . he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

Id. Defense counsel replied, "We have no objection." And, the trial court granted the prosecutor's cause challenge. *Id.*

3. THE WASHINGTON STATE SUPREME COURT

The Washington State Supreme Court said, " . . . the trial court did not abuse its discretion in excusing Mr. Deal for cause." *State v. Brown*, 132 Wn.2d 529, 602, 940 P.2d 546 (1997); Pet. App. 173a. That Court said:

> On voir dire he indicated he would impose the death penalty where the defendant "would violate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later.

Id.

4. THE CIRCUIT COURT

In its opinion, which Brown discusses more fully below, the Ninth Circuit reviewed the state court record and determined that the state courts' determination that Juror Deal was substantially impaired was an unreasonable application of this Court's controlling precedent because the state courts focused on factors that were not relevant. Further, even if the state courts made findings that could justify excusing Juror Deal for cause, such a determination of the facts would be unreasonable in light of the evidence presented, and the presumption of correctness as to such factual findings would be overcome. Pet. App. 1a-41a.

B. SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Circuit Court under 28 U.S.C. § 2254(d)(1) and (d)(2). The Washington State trial court and the State Supreme Court properly recognized that under this Court's controlling precedent, a prospective juror in a capital case may be excluded for cause based on his views regarding capital punishment only when those views would prevent or substantially impair the performance of the juror's duties

in accordance with the trial court's instructions and the juror's oath. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987).

There were arguably two rulings by the state courts on this issue. The first ruling was the Washington State Supreme Court's determination that Juror Deal was properly excused because he "indicated he would impose the death penalty where the defendant 'would violate if released' which is not a correct statement of the law." The second ruling was the trial court's unadorned grant of the State's motion to excuse the Juror Deal.

The Washington State Supreme Court's decision was objectively unreasonable, however, because even if Juror Deal was confused about the fine points of Washington law, the record did not demonstrate that Juror Deal held any views about capital punishment that substantially impaired his ability to consider the facts and the law. Thus, the Washington State Supreme Court's ruling was an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

As the Washington State Supreme Court found, the trial court's exclusion of Juror Deal was based on his misunderstanding of the law, and not on any true finding that his views would prevent him from fairly considering the death penalty. Further, even if the trial court had actually found that Juror Deal's views regarding the death penalty substantially impaired his ability to impose it, such a finding would be an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). In voir dire Juror Deal stated *six times* that he could follow the law and impose the death penalty while not once stating he might not be able to so. Similarly, if any presumption of correctness applies to such

hypothetical factfinding, it is easily rebutted by the clear and convincing evidence in the record. 28 U.S.C. § 2254(e)(1).

C. ARGUMENT

1. THE PROPER STANDARD OF REVIEW

The Circuit Court's opinion is not entirely clear as to which precise section of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA) controls this case. Uttecht's brief cites to several sections of AEDPA. In Brown's view this case is governed by 28 U.S.C. § 2254(d)(1)'s prohibition against the unreasonable application of this Court's precedent and section (d)(2)'s prohibition against affirming a state court decision based upon an unreasonable determination of the facts. That statute provides:

> An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States: or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In subsection 1, the terms "contrary to" and "unreasonable application" have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the "unreasonable

application" clause, a federal court may grant the writ if the state court identifies the correct governing legal principle but unreasonably applies it to the facts of the prisoner's case. *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

2. THE WASHINGTON STATE SUPREME COURT'S DECISION WAS AN OBJECTIVELY UNREASONABLE APPLICATION OF *WITT*, *WITHERSPOON* AND *GRAY*

The trial court may not constitutionally excuse jurors from sitting on a capital case merely because the jurors have reservations about the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985). A juror may not be excluded merely because of conscientious scruples about capital punishment if the juror is "willing to consider all of the penalties provided by state law," and is not "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. at 522 n.21. "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519.

The parties agree that the standard for determining whether a prospective juror may be excluded for cause based on their views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Gray v. Mississippi*, 481 U.S.

648, 658 (1987); *Wainwright v. Witt*, 469 U.S. at 424; *Adams v. Texas*, 448 U.S. 38, 45 (1980).

This standard is rooted in the constitutional right to an impartial jury, *Wainwright v. Witt*, 469 U.S. at 416, and because "the impartiality of the adjudicator goes to the very integrity of the legal system," the harmless-error analysis cannot apply. *Gray v. Mississippi*, 481 U.S. at 668.

In this case there were arguably two state court "findings" regarding Juror Deal. The first ruling was the Washington State Supreme Court's determination that Juror Deal was properly excused because he "indicated he would impose the death penalty where the defendant 'would violate if released' which is not a correct statement of the law." The second ruling, discussed in Section 3, was the trial court's unadorned grant of the State's motion to excuse Juror Deal. Uttecht refers to the state court "findings" in his brief without distinction. In Brown's view, however, both state courts' decisions were properly reversed, even under the constraints of AEDPA, although for different reasons.

The Washington State Supreme Court concluded that the trial court excluded Juror Deal because he was confused about Washington law. As Judge Kozinski points out, taking the Washington State Supreme Court's holding in a light most favorable to the State, the decision to affirm the trial court was objectively unreasonable under this Court's precedent. Pet. App. 17a. A prospective juror may be excluded for cause only if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

and his oath." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987).

Juror Deal never said he could only impose the death penalty if there were proof that the defendant would kill again. He simply stated that recidivism was one factor that would be important to his decision. There is nothing about this statement that indicates he could not follow the law or his oath. At best, the Washington State Supreme Court found that confusion was a proper basis for a challenge for cause in a capital case. As the panel noted, this is not the law as expressed by this Court.[2]

A prospective juror's confusion about the law during voir dire is simply not a basis for concluding that his views about the death penalty would substantially impair his ability to follow the law or honor his oath. Few jurors could pass a quiz about the law during voir dire, but that does not mean they are unwilling or unable to follow the law after being given instructions at the close of the case.

Uttecht's argument in his brief actually expands the Washington State Supreme Court's finding. Uttecht cites to Juror Deal's statements that he would impose the death penalty in a "severe situation" and his comments that he would be more likely to vote for the death penalty if the person would kill again. Uttecht says that "[i]n Washington, the prosecutor need not prove the defendant will go

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[2] Judge Kozinski also expressed the reason why this should never be the policy endorsed by this Court. He said: "If all prospective jurors who did not fully understand the law were struck, only lawyers would be allowed to serve on juries (and only a handful of lawyers at that)." Pet. App. 17a.

out and kill again." Brief of Petitioner at 37.[3] From that he argues that Juror Deal would not be able to consider the death penalty when the only possible penalties would be life in prison or the death penalty. But Juror Deal did not say that.

In fact, the question was put to him directly by the prosecutor who asked:

> But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

Juror Deal's unequivocal answer was:

> I could consider it, yes.

JA 73.

The Washington State Supreme Court's finding was also based upon a faulty factual premise, specifically, a faulty reading of Washington's capital punishment scheme. Washington's death penalty statute provides for a two-phase trial.[4] *See* RCW 10.95 *et seq.* In the first or

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[3] The Washington State Supreme Court also appeared to hold that Deal misunderstood the burden of proof at trial and that misunderstanding justified excusing him. The prosecutor withdrew that as a basis for his motion to exclude Juror Deal at trial. Moreover, Uttecht does not urge that as a proper basis for affirming the state courts. *See* Brief of Appellant at 37-40. But, as argued above, confusion about the law of the state of Washington says nothing about a juror's ability to follow his oath and the court's instructions.

[4] In the Ninth Circuit, the dissenting justices held that: "Although some might find that Juror Z had eschewed and rejected his prior improper basis for application of the death penalty, a reasonable mind could just as easily find that he *had not* eschewed and rejected that

(Continued on following page)

"guilt" phase, the jury must consider whether the defendant has committed premeditated murder with aggravating circumstances. RCW 10.95.020. If the defendant is convicted of that charge, the jury is reconvened to consider punishment during the "penalty" phase. RCW 10.95.060.

In seeking a death sentence during the penalty phase, the State may present evidence of (a) defendant's prior criminal convictions, (b) matters that would have been admissible during the guilt phase, and (c) matters describing the victim and the impact of the crime on the victim's family. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995); *see also* RCW 10.95.060(3). The State may also rebut matters raised in mitigation. *Id.*

Washington statutes clearly place the sentencing phase burden on the prosecution to prove beyond a reasonable doubt the absence of sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4); JA 149 (Court's Penalty Phase Instruction #5). At the conclusion of the proceeding, the following question is submitted to the jury:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

RCW 10.95.060(4). This statutory question was given to the jury in this case. JA 150 (Court's Penalty Phase Instruction #6).

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basis." Pet. App. at 37a. But, the dissenters' premise is incorrect. Juror Deal never articulated an "improper" consideration under Washington law, and thus, it was not reasonable for the Washington courts to conclude that he had.

In deciding the question posed by RCW 10.95.060(4), the jury may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

RCW 10.95.070 (emphasis added).

The Washington State Supreme Court has held that it is entirely proper for a prosecutor to argue that a defendant will pose a danger in the future even if sentenced to life in prison without the possibility of parole. *State v. Gentry*, *supra* at 641. That court stated:

> The evidence introduced during the penalty phase of the trial showed that the Defendant had been convicted of rape with a deadly weapon and of manslaughter, as well as other crimes, before he was convicted of aggravated first-degree murder in this case. From the facts before the jury, it was not unreasonable for the prosecuting attorney to argue that the Defendant is a dangerous person who would continue to present a danger even while incarcerated.

Id.

Thus, contrary to statements made in the briefing by Uttecht, future dangerousness is relevant under Washington's death penalty scheme. RCW 10.95.070(8). The converse, of course, is that evidence that a defendant does not pose a risk of probable future dangerousness is also relevant. This Court has held that evidence of probable future conduct in prison as a well-behaved, well-adjusted prisoner is relevant mitigating evidence, which is appropriately considered by a jury in deciding on a sentence less than death. *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). In deciding whether to impose a death sentence, the "sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant

mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998).[5]

In this case, the Washington State Supreme Court presumed that Juror Deal was excused because he indicated he would impose the death penalty where the defendant "would violate if released." The Washington State Supreme Court did not correctly set out the law. Washington law specifically provides that issues of future dangerousness are proper considerations in capital cases. Juror Deal's stated concerns about recidivism actually reflected the law of Washington.[6] Thus, the Washington State Supreme Court's decision to excuse Juror Deal was an unreasonable application of the facts to the law.

Uttecht also seems to suggest that the only instruction given to the jury is the one describing the question they are to answer in Instruction 6. Brief of Petitioner at 38. But the jurors are also given additional instructions telling them that a "mitigating circumstance is a fact about either the offense or about the defendant which i[n] fairness or in mercy may be considered as extenuating or

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[5] In addition to these statutory factors, in Washington the jury may consider any other mitigating factors. *State v. Bartholomew*, 101 Wn.2d 631, 646-47, 683 P.2d 1079, 1086-87 (1984), *appeal after remand*, 104 Wn.2d 844, 710 P.2d 196 (1985) ("It is our belief that when a jury is faced with the question whether or not the defendant should be put to death, the defendant should be allowed to submit any evidence of his 'character or record and any of the circumstances of the offense,' to convince the jury that his life should be spared.").

[6] While it is true that the Washington State Supreme Court is the final arbiter of Washington law, it is clear that the court's statement in this case was a momentary lapse, not a rejection of the statute. The *Gentry* case, quoted above, was issued after the decision in this case and clarifies that recidivism remains a relevant consideration under Washington law.

reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense." *See e.g.* JA 151 (Court's Penalty Phase Instruction #7). Thus, a juror would be free to consider a defendant's lack of future dangerousness in any capital case if he thought it "justified a sentence of less than death."

3. THE WASHINGTON STATE TRIAL COURT'S "IMPLICIT FINDING" WAS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN STATE COURT

a. Clearly erroneous findings are addressed by this Court under 28 U.S.C. § 2254(d)(2).

Clearly erroneous factual findings have been addressed by this Court under 28 U.S.C. § 2254(d)(2). *Wiggins v. Smith*, 539 U.S. 510 (2003).[7] In that case, this Court considered whether or not trial counsel was ineffective in failing to properly investigate mitigating evidence in a capital case. The state court held that the investigation was adequate based, in part, upon evidence that trial counsel had social services records detailing Wiggins' childhood sexual abuse. Thus, the state court concluded that the failure to present the evidence of sexual abuse was a tactical decision. This Court held that the state court's assumption that the social service records documented instances of this sexual abuse was incorrect and accordingly "reflects an unreasonable determination of the

[7] Brown assumes that AEDPA standards of review apply to both implicit and express findings by state trial courts.

facts in light of the evidence presented in the state court proceeding, § 2254(d)(2)." *Id.* at 528. *See also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding, § 2254(d)(2).").

Uttecht also cites to the "presumption of correctness" in 28 U.S.C. § 2254(e)(1). Brief of Petitioner at 22-26. The relationship between the standards in §§ 2254(e)(1) and 2254(d)(2) remains unclear.[8] But the resolution of this case does not depend upon whether this Court applies only § (d)(2)'s prohibition against affirming a state court decision based upon an unreasonable determination of the facts or whether this Court first applies a "presumption of correctness" to those facts. The clear and convincing evidence in the record that Juror Deal was fit to serve on a capital jury overcomes any presumption that the trial court's implicit factual findings were correct. Thus, this Court need not resolve the issue in this case. *See e.g. Rice v. Collins*, 546 U.S. 333 (2006) (Even though the parties disagreed about the application of § 2254(d)(2) and (e)(1), the Court did not need to address the disagreement in order to resolve the case).

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[8] Under one view, 28 U.S.C. § 2254(e)(1) applies only to challenges based on extrinsic evidence, or evidence presented for the first time in federal court, and requires proof by clear and convincing evidence, while the court must apply 28 U.S.C. § 2254(d)(2) to intrinsic review of a state court's processes, or situations where petitioner challenges the state court's findings based entirely on the state record. *See e.g. Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), *cert. denied, Maddox v. Taylor*, 543 U.S. 1038 (2004).

b. To the extent that the trial court made a "finding" that Juror Deal was substantially impaired, it was objectively unreasonable and contrary to the clear and convincing evidence on the record.

Uttecht argues that the factual finding that Deal was substantially impaired is implicit from the following facts: "there is a transcript of voir dire showing the potential juror was questioned in the presence of counsel and the judge; at the end of colloquy, the prosecution challenged the juror; and the challenge was sustained when the judge dismissed the juror." Brief of Petitioner at 20. In Uttecht's view, if Juror Deal was excused, it must have been for a proper reason, even if no reason was articulated on the record and the actual transcript of the proceedings demonstrates otherwise.

Uttecht first cites to *Wainwright v. Witt,* 469 U.S. 412 (1985), and *Darden v. Wainwright,* 477 U.S. 168 (1986), for this proposition. Neither case supports his position, however. In those cases the challenged jurors stated express views that would likely prevent them from following the law. In *Darden*, the trial court asked the juror, "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" After the juror responded, "Yes, I have," he was excused. *Darden v. Wainwright*, 477 U.S. at 177.[9]

[9] The Court also noted that the juror had spent eight years working in the administration office of St. Pios Seminary. *Darden*, 477 U.S. at 178.

In *Witt* the questioning was as follows:

> [Q. Prosecutor]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> [A. Colby]: I am afraid personally but not –
>
> [Q]: Speak up, please.
>
> [A]: I am afraid of being a little personal, but definitely not religious.
>
> [Q]: Now, would that interfere with you sitting as a juror in this case?
>
> [A]: I am afraid it would.
>
> [Q]: You are afraid it would?
>
> [A]: Yes, Sir.
>
> [Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> [A]: I think so.
>
> [Q]: You think it would.
>
> [A]: I think it would.
>
> [Q]: Your honor, I would move for cause at this point.
>
> THE COURT: All right. Step down.

Witt, 469 U.S. at 415-16. Later in the opinion, Chief Justice Rehnquist states that the challenged juror "on four separate occasions . . . affirmed that her beliefs would interfere with her sitting as a juror." *Id.* at 434.

In those cases, the record actually supported rather than contradicted the trial judges' rulings. The trial judges

took the jurors at their word and excused them. This Court affirmed those decisions. In this case, however, Juror Deal never once expressed any hesitation about his ability to follow the trial court's instructions on the law. As the Ninth Circuit panel decision noted, Juror Deal repeatedly and unequivocally stated the he could follow the law. Pet. App. at 10a n.5 ("In fact during the course of his voir dire, juror Z stated *six times* that he could follow the law and impose the death penalty, while not *once* stating that he might not be able to . . . ") (emphasis in original).

Uttecht also cites to several other decisions by this Court that he believes support his position. But all are distinguishable. In *Marshall v. Lonberger*, 459 U.S. 422 (1983), this Court gave deference to the state court's determination that the defendant's testimony regarding his prior out-of-state conviction was obtained through an involuntary plea was not credible. But in that case, unlike in this one, the other evidence introduced including the indictment, the record of the out-of-state conviction and the transcript of the plea hearing contradicted the defendant's testimony.

Patton v. Yount, 467 U.S. 1025 (1984), concerns the effect of pretrial publicity on the jury venire. In that case the petitioner identified three jurors he asserted were ambiguous and contradictory in their answers regarding their ability to be impartial given the pretrial publicity. This Court held that the trial court's determination that the jurors could serve was supported by their testimony but also by "the record of publicity," which did not "reveal the kind of 'wave of public passion' that would have made a fair trial unlikely." *Id.* at 1039. The challenged jury voir dire took place before Yount's second trial; four years after the commission of the crime and the first trial. Again, in

that case there was additional evidence that corroborated the trial judge's findings and made deference appropriate.[10]

The voir dire in this case unambiguously reveals that Juror Deal was willing to consider all of the evidence and both sentencing options in the penalty phase. It is remarkably similar to the facts described by this Court in *Gray v. Mississippi*, 481 U.S. at 651-55. In *Gray*, the challenged juror was excused because, according to the state and the trial judge, she was "indecisive." *Id.* at 655 n.7. Nonetheless, the state appellate courts reversed the trial court because the juror had been improperly excused for cause under the *Witt* standard. Here, the best that can be said of Juror Deal was that during voir dire he was "indecisive" about the circumstances in which he would vote to impose the death penalty, but he would consider all of the options in any given case. He is precisely the type of juror who can and should be seated in a capital case under the precedent issued by this Court.

Given the paucity of support for his "implicit" finding of impairment in the actual transcript, Uttecht argues that the trial judge's unique ability to observe the juror's body language and demeanor supports the trial judge's decision. While that might be a basis to uphold the trial court in some cases where the trial judge or the parties make a record of such observations, it is not a basis in this case. Neither the trial judge nor the prosecutor mentioned any postures, gestures or other unspoken behavior on the part of Juror Deal that would support the trial judge's

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[10] *Gomez v. United States*, 490 U.S. 858 (1989), is simply irrelevant. In that case, the issue was whether United States Magistrates could preside over jury selection in a felony trial.

ruling. Thus, not only does Uttecht urge this Court to uphold an implicit factual finding that is contrary to the record, he urges this Court to support that finding with speculation about what the trial court *might* have observed. This Court has made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it. *See Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (denying relief where state court's application of federal law was "supported by the record"); *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court"). The record here supports only one conclusion: Juror Deal could properly serve on a capital jury.

Judge Kozinski identifies the problems with Uttecht's position under the statutory language when he points out that juror demeanor can only shed light on ambiguous evidence in the transcript, but it cannot contradict the witness's statements. Pet. App. 17a. In the trial court, the State, as the moving party, bears the burden of demonstrating that the *Witt* standard is satisfied as to each challenged juror. *Witt*, 469 U.S. at 424. But there was no mention of "demeanor" by the prosecutor in the trial court record. In this situation, nothing in AEDPA requires a federal court on habeas review to speculate that there was some definitive "demeanor" on the part of the juror that contradicted his express statements in order to uphold an otherwise objectively unreasonable decision.

It would be an odd rule indeed for this Court to hold that a trial judge can ignore or discount the juror's answers to the questions on voir dire in the absence of any other evidence to justify such an action. Brown agrees that if there was evidence cited to by the trial judge or the

challenging party – even just a gesture or a facial expression – that might be a basis to find that the juror's express statement that he could follow the law was not "conclusive." Similarly, in a case where the juror's responses were truly ambiguous, deference to the trial judge's assessment of demeanor may be appropriate. But here, Uttecht seems to urge this Court to hold that the juror's statements are never conclusive even where the trial record is unambiguous and in the absence of any contradictory evidence.

Judge Kozinski and the panel were also acutely aware of this Court's decision in *Rice v. Collins,* 546 U.S. 333 (2006); Pet. App. at 19a n.10. In that case, this Court held that the Ninth Circuit overstepped its bounds on AEDPA review. But that case is distinguishable from this one. In *Rice*, the Ninth Circuit held that it was unreasonable for the trial court to accept the prosecutor's race-neutral explanation – youth and demeanor – for a peremptory challenge of a juror. But, as Judge Kozinski points out, in that case there was actually an express ruling from the trial court that the juror's youth was an acceptable race-neutral reason for excluding the juror. As to demeanor, the prosecutor cited to a concerning gesture on the record – eye rolling. Moreover, the trial court had applied the correct legal standards.

The Brief of the State of Oregon, *et al.*, argues that this Court should not issue an opinion that "requires judges to make express written findings on the record in order to qualify for the 'presumption of correctness.'" *See* Brief of Oregon, *et al.*, at 13. Brown is not urging such a ruling. Rather, he is arguing that like express findings, implicit findings must have some support in the evidence and record before the reviewing court – even on habeas review.

Moreover, Brown respectfully disagrees that requiring trial courts to say something by way of a finding on the record would unduly delay trials. Even a sentence or two would be sufficient for most reviewing courts. If the trial court simply cites the correct standard and some legitimate reason for its actions, the decision to give conclusive deference would be obvious. It would certainly be advantageous to the inevitable appellate review of habeas cases to encourage, rather than discourage, trial courts to articulate some factual findings on the record to support their decisions in capital cases. For example, in *Norton v. Spencer*, 351 F.3d 1, 6 (1st Cir. 2003), the Circuit court complained: "It is difficult to determine how to approach the analysis under AEDPA because neither the trial court nor the [appellate court] provided a thorough explanation of their decisions." *See also Hennon v. Cooper*, 109 F.3d 330, 335 (1997) ("[O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review.").

Uttecht's view of the AEDPA standard of review of state court factual findings is extreme. It is true that AEDPA embodied Congress's intent to limit and structure federal habeas review of state court convictions. But it did not *eliminate* federal review of factual findings. As Judge Kozinski points out in the panel decision, adopting Uttecht's view of the federal habeas standards would essentially end federal habeas review not just of jury selection in capital cases, but of all factual issues on habeas review. He says:

> If appellate courts must defer to trial court findings on a transcript such as this . . . not only is *Witherspoon* a dead letter, but all substantial

> evidence review of trial court factual findings is obsolete.

Pet. App. 17a.

The AEDPA deference standards are demanding but not "insatiable." As this Court has stated, "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). This Court went on to say:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Id., *affirmed*, *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Concerns about rendering federal court review obsolete are particularly acute with regard to juror challenges in capital cases. This Court has stressed the "acute need" for reliable decision making when the death penalty is at issue. *See Deck v. Missouri*, 544 U.S. 622, 632 (2005); *see also Herrera v. Collins*, 506 U.S. 390, 404 (1993) (The Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed.) Reliable decision-making, even on habeas review, requires that the federal court find some evidence, either direct or circumstantial, to support a trial court finding that would overcome uncontroverted evidence to the contrary.

4. THE FACT THAT BROWN'S LAWYERS DID NOT OBJECT DOES NOT AID UTTECHT'S ARGUMENTS UNDER UNIQUE ASPECTS OF WASHINGTON LAW

Uttecht also argues that defense counsel's failure to object was "significant" in this case because, had counsel done so, "the trial judge would have put his reasons for finding Mr. Deal substantially impaired on the record." Brief of Petitioner at 38. But Washington law does not support this argument. The Washington State Supreme Court has "long held that even if the defendant fails to object at trial, error may be raised on appeal if it 'invades a fundamental right of the accused.'" *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).[11]

Specifically, the Washington Court of Appeals held in 1992, one year before jury selection in this case, that *Batson*[12] challenges, specifically those based on gender discrimination, could be raised for the first time on appeal. *State v. Burch*, 65 Wn. App. 828, 830 P.2d 357 (1992); *see also State v. Beliz*, 104 Wn. App. 206, 15 P.3d 683 (2001).[13]

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[11] Washington's Rules of Appellate Procedure codify this right: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a).

[12] *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting the use of preemptory challenges designed to discriminate on the basis of race).

[13] In a subsequent case, a Washington appellate court went even further, imposing a duty on the trial judge to insure an impartial jury despite the lack of defense objection.

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In short, Brown's lawyer did not have to object in order to preserve this error for review in Washington. Both the prosecutor and the trial judge knew that defense counsel's failure to object to the improper recusal of a juror would not prevent appellate review. And, in fact, it did not. As discussed above, the Washington State Supreme Court decided this issue on its merits. *See State v. Brown*, 132 Wn.2d 529, 586, 940 P.2d 546 (1997); JA 173a.[14] Under those circumstances, neither the trial judge nor the prosecutor could or should have taken any comfort in the assumption that because defense counsel did not object, he agreed with the trial court's assessment that the juror was

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> Accordingly, when a trial judge presides over a trial where the peremptory challenge is being used in an invidiously discriminatory way, that judge may, in his or her discretion, act to protect the rights secured by the equal protection clause by raising a *Batson* issue. Failure to act in such a situation runs the substantial risk of casting doubt on the fairness of the judicial process. Taking appropriate action in such a situation promotes respect for the law. And taking such action is consistent with a court's considerable discretion in conducting judicial proceedings in a way that is fair to all. In short, a judge need not sit idly by while the right to participate in our judicial system, free of bias, is infringed by the discriminatory use of peremptory challenges.

State v. Evans, 100 Wn. App. 757, 767, 998 P.2d 373 (2000).

[14] Consideration of constitutional errors raised for the first time on appeal is not uncommon in Washington. *See e.g. State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006) (accused's rights to a public trial and to be present at his criminal trial); *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001) (right to appear pro se); *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000) (ineffective assistance of counsel); *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006) (involuntariness of a guilty plea); *State v. Littlefair*, 129 Wn. App. 330, 119 P.3d 359 (2005) (failure to suppress evidence); *State v. Curtis*, 110 Wn. App. 6, 37 P.3d 1274 (2002) (right to remain silent); *State v. Clowes*, 104 Wn. App. 935, 18 P.3d 596 (2001) (failing to instruct the jury on an element of the crime charged).

substantially impaired. Thus, the lack of citation to a proper reason is far more telling than Brown's failure to object. If there had been a proper reason for excusing Juror Deal, either the prosecutor or the judge should have made sure the record reflected that excusing Juror Deal comported with the constitutional standards.

5. THE NEED FOR DEFERENCE IN THIS CASE IS NO STRONGER THAN IN ANY OTHER CASE

Finally, the Solicitor General argues that the "case for deference is particularly strong (and the costs of reversal particularly high) in a case like this where the trial court has *granted* a motion to strike for cause, because there is no risk that a biased juror will actually sit." Brief for the United States at 18-19. But the issue addressed by the *Witt* and *Witherspoon* cases was not that biased jurors were being seated on capital juries. The problem was identical to that here: preventing jury selection that results in a "tribunal organized to return a verdict of death." *Witherspoon*, 391 U.S. at 521.

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Id. at 521-22. Thus, the case for deference is not "particularly strong" here nor are the "costs of reversal particularly high." The case for deference is no stronger here than in *Witt*, *Witherspoon*, *Darden*, *Adams* and *Gray*. The Ninth

Circuit gave the proper deference to the findings, such as they were, in this case and properly concluded that the decisions in the state courts were objectively unreasonable.

D. CONCLUSION

This Court should affirm the Circuit court's grant of Brown's writ of habeas corpus.

Respectfully submitted,

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No. 06-413

In the Supreme Court of the United States

JEFFREY UTTECHT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, PETITIONER

v.

CAL COBURN BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question: Whether a court of appeals should give deference to a trial court's decision, based on its in-court observations, to remove a potential juror for cause when the juror states that he could follow the law and impose a capital sentence but expresses uncertainty about the circumstances in which he in fact could do so.

TABLE OF CONTENTS

Page

Interest of the United States 1
Constitutional provision involved 2
Statement 2
Summary of argument 13
Argument:
A reviewing court should give substantial deference to a trial court's dismissal of a prospective capital juror for cause where the juror asserts that he could follow the law and impose a capital sentence but expresses uncertainty about the circumstances in which he could do so 15
A. Determinations about juror bias based on credibility assessments fall uniquely within the trial court's province 16
B. The trial court's decision in this case to dismiss juror Deal for cause warrants deference and should be sustained 19
1. Juror Deal expressed uncertainty concerning whether he could impose a capital sentence when there is no possibility that the defendant could be released and again commit murder 19
2. The court of appeals erred in requiring the trial court to give conclusive weight to Deal's statements that he could follow the law and impose a capital sentence 23
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) 26

Cases—Continued: Page

Darden v. *Wainwright*, 477 U.S. 168 (1986) 17, 24
Gomez v. *United States*, 490 U.S. 858 (1989) 26
Gray v. *Mississippi*, 481 U.S. 648 (1987) 28, 29
Morgan v. *Illinois*, 504 U.S. 719 (1992) 25
Patton v. *Yount*, 467 U.S. 1025 (1984) 16, 26, 29
Reynolds v. *United States*, 98 U.S. 145 (1878) 16, 26
Thompson v. *Keohane*, 516 U.S. 99 (1999) 16
United States v. *Barnette*, 211 F.3d 803 (4th Cir. 2000) 2
United States v. *Brown*, 441 F.3d 1330 (11th Cir. 2006), cert. denied, 127 S. Ct. 1149 (2007) 2
United States v. *Fulks*, 454 F.3d 410 (4th Cir. 2006), petition for cert. pending, No. 06-9232 (filed Jan. 19, 2007) 2
United States v. *Purkey*, 428 F.3d 738 (8th Cir. 2005), cert. denied, 127 S. Ct. 433 (2006) 2
United States v. *Webster*, 162 F.3d 308 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999) 2
Wainwright v. *Witt*, 469 U.S. 412 (1985) ..... *passim*
Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 17

Constitution and statutes:

U.S. Const. Amend. VI 2, 15
28 U.S.C. 2254 1
28 U.S.C. 2254(d)(1) 11

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INTEREST OF THE UNITED STATES

This case raises the question whether a court of appeals should give deference to a trial court's decision, based on its in-court observations, to remove a potential juror for cause when the juror states that he could follow the law and impose a capital sentence but expresses uncertainty about the circumstances in which he in fact could do so. While the case comes to this Court in a federal habeas challenge to a state conviction under 28 U.S.C. 2254, and thus implicates questions concerning the standards of review in that context, comparable issues of deference to a finding of juror bias arise on direct review. Cf. *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985) (noting that trial court findings about juror bias are "entitled to deference even on direct review"). Accordingly, a trial court's ability to remove a potential capital juror for cause, even where the juror indicates an

ability to impose capital punishment, and a reviewing court's obligation to give deference to a trial court's credibility assessments in that process, implicate issues that arise in federal capital trials and on appellate review of federal capital convictions.[1] The United States therefore has a substantial interest in the Court's resolution of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

STATEMENT

1. On May 23, 1991, respondent forcibly entered Holly C. Washa's automobile in the parking lot of a hotel near the Seattle-Tacoma Airport and demanded at knife-point that she "drive or die." Respondent later forced Washa into the passenger seat, tied her hands behind her back, and drove her to his motel. In his motel room, respondent forced Washa to remove her clothes, tied her to the bed, and raped and physically abused her repeatedly over the course of several hours. The following day, respondent again tied Washa to the bed and sexually assaulted her with a bottle, and he also shocked her with an electric extension cord. That eve-

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[1] See, *e.g. United States* v. *Fulks*, 454 F.3d 410, 427-430 (4th Cir. 2006), petition for cert. pending, No. 06-9232 (filed Jan. 19, 2007); *United States* v. *Brown*, 441 F.3d 1330, 1356-1357 (11th Cir. 2006), cert. denied, 127 S. Ct. 1149 (2007); *United States* v. *Purkey*, 428 F.3d 738, 750-751 (8th Cir. 2005), cert. denied, 127 S. Ct. 433 (2006); *United States* v. *Barnette*, 211 F.3d 803, 812 (4th Cir. 2000); *United States* v. *Webster*, 162 F.3d 308, 340-341 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999).

ning, respondent left for the Seattle-Tacoma Airport to take a flight to California to meet Susan J. Schnell, with whom he had made weekend plans. Before driving Washa's car to the airport, respondent forced Washa into the trunk of the car, cut her throat and stabbed her repeatedly, and left her in the trunk to bleed to death. Several days later, Washa's body was found in the trunk of her car. Pet. App. 5a-6a, 97a-101a. 103a.

Respondent then flew to Palm Springs, California, to meet Schnell, whom he had recently met on an airplane. On May 25, 1991, respondent and Schnell checked into a hotel in Palm Springs. The following evening, while in their hotel room, respondent slit Schnell's throat with a knife, tied her to the bed, and raped her. Schnell managed to call the hotel desk clerk for help while respondent was out of the room. Officers arrived, obtained a description of respondent from Schnell, and arrested respondent in the hotel parking lot. Pet. App. 6a, 101a-102a.

Respondent then made recorded statements to police detectives in which he confessed to the rape and murder of Washa in Seattle as well as the rape and attempted murder of Schnell in Palm Springs. Respondent subsequently pleaded guilty in California to the attempted murder of Schnell, and to aggravated mayhem, torture, robbery, and false imprisonment. He was sentenced to life imprisonment for those crimes. Pet. App. 6a, 103a.

2. On June 11, 1991, respondent was charged in Washington with aggravated first-degree murder in connection with Washa's murder. The State sought to have a jury impose a sentence of death. Pet. App. 104a-105a.

a. On October 25, 1993, the trial court began jury selection. Pet. App. 105a. Prospective jurors completed a questionnaire that included questions about capital

punishment, and certain prospective jurors were questioned individually in court. See Pet. 6; Pet. App. 228a-229a, 235a. On November 3, 1993, the trial court and counsel for both sides questioned prospective juror Richard Deal. *Id.* at 222a-242a; see *id.* at 173a. Deal had stated in his responses to the questionnaire that he was in favor of capital punishment if it were proved beyond a shadow of a doubt that the defendant had killed and would kill again. *Id.* at 235a; see *id.* at 228a.

Respondent's counsel questioned Deal initially. After explaining to Deal that jurors in the penalty phase "consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed," Pet. App. 227a, counsel stated:

> Q One sort of aside here, life without parole is exactly what i[t] sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.
>
> A I understand.
>
> Q Were you aware before that Washington has got this kind of sentence where it[]s life without parole where you are not ever eligible for parole?
>
> A I did not until this afternoon.
>
> Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt.
>
> Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.

Id. at 227a-228a.

In light of Deal's statement that "the type of situation that [a capital sentence] would be appropriate" is if the defendant "would reviolate if released," Pet. App. 228a, respondent's counsel attempted to explain to Deal once again that there was no possibility that a defendant convicted of a capital crime could be released on parole:

Q Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not

they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

Id. at 228a-229a. Counsel then turned to more general questions about "the frequency of the use of the death penalty in the United States today." *Id.* at 229a. Deal stated that "I think in severe situations it is appropriate." *Ibid.*

After respondent's counsel completed her questions, counsel for the State questioned Deal. Following introductory questions, counsel asked Deal about his statement on the jury questionnaire "that you're in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." Pet. App. 235a.

Q * * * Do you remember making that statement?

A Yes.

* * * * *

Q Now, you made this statement before you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct would you it means beyond all doubt or beyond any shadow of

a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

Id. at 235a-236a. Counsel subsequently asked whether Deal "would be satisfied with a reasonable doubt standard? You would be willing to follow the law?" *Id.* at 236a. Deal answered, "Yes." *Id.* at 237a.

Counsel then questioned Deal concerning his statements that the likelihood that the defendant would kill again would bear materially on his consideration of a capital sentence:

Q Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come into contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill

again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under the assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Pet. App. 237a-238a.

After stating that he "realize[d] this is put on you rather suddenly," counsel for the State again reiterated "that the person would never get out for the rest of his life." Pet. App. 238a. Counsel asked Deal, "could you consider" imposing the death penalty, "and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?" *Id.* at 238a-239a. Deal responded, "Yes, sir," *id.* at 239a, and counsel continued as follows:

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should

be a waiting line of people happening every day or every week even, but I think in severe situations it[ ]s an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the appropriate measure.

Ibid. At that point, counsel stated that he had no further questions for Deal. *Id.* at 240a.

The trial judge excused Deal and asked whether either counsel wished to raise a challenge to Deal. Pet. App. 241a. Counsel for the State responded affirmatively, explaining:

I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again

> before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

Id. at 241a-242a. Respondent's counsel responded, "[w]e have no objection." *Id.* at 242a. The trial court then removed Deal for cause, stating, "Counsel, the request of the prosecutor's office, we will go ahead and excuse Mr. Deal." *Ibid.*

b. On December 10, 1993, the jury found respondent guilty of aggravated first-degree murder. Pet. App. 105a. On December 15, 1993, the penalty phase proceedings began, at the close of which respondent was sentenced to death. *Ibid.*

3. The Supreme Court of Washington affirmed respondent's conviction and sentence. Pet. App. 92a-221a. The court rejected respondent's argument that the trial court had abused its discretion in excusing Deal for cause. The court explained that the "standard for ruling on challenges for cause in a death penalty case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror." *Id.* at 171a (citing, *inter alia*, *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985)). The court observed that it gave "deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially," because the "trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial." *Ibid.*

Applying those standards, the court found no abuse of discretion in the trial court's dismissal of Deal. After observing that respondent had not objected to the State's challenge of Deal, the court explained that, "[o]n voir dire [Deal] indicated he would impose the death

penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. The court also noted that Deal "misunderstood the State's burden of proof in a criminal case and understood it to be 'beyond a shadow of a doubt,' although he was corrected later." *Ibid.* The court concluded that the "trial court properly exercised its discretion in excusing [Deal] for cause," because his "views would have prevented or substantially impaired [his] ability to follow the court's instructions and abide by [his] oath[] as juror[]." *Id.* at 208a.

4. Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington. Pet. App. 43a. The district court denied respondent habeas relief. *Id.* at 43a-91a. In rejecting respondent's arguments concerning the removal of Deal for cause, the court observed that Deal had "indicated some confusion about the impact of a life sentence without parole and the standard of proof" by stating "that he would only impose the death penalty if someone could kill again on parole, and that the standard of proof was 'beyond a shadow of a doubt' rather than 'beyond a reasonable doubt.'" *Id.* at 77a-78a. The court found that there was "sufficient evidence to establish that [Deal's] views would 'prevent or substantially impair' his * * * ability to carry out the duties imposed on jurors." *Id.* at 79a.

5. The court of appeals reversed. Pet. App. 1a-19a. It held that respondent was entitled to habeas relief on his claim that the trial court had erred in removing Deal for cause, because the removal was "directly contrary to Supreme Court precedent." *Id.* at 19a (citing 28 U.S.C. 2254(d)(1)).

a. The court of appeals emphasized that Deal had "stated unequivocally that he could consider the death penalty as an option if told to do so," Pet. App. 10a, and that, "[m]ost importantly, he promised he would 'follow the law' without reservation," *id.* at 11a. In the court of appeals' view, any finding that Deal was impaired in his ability to follow the law would have been unreasonable on the record because Deal had "ultimately stated that [he] could consider the death penalty in an appropriate case." *Id.* at 13a (brackets in original).

With respect to Deal's statements indicating that it would be significant to him whether a defendant could kill again, the court determined that those statements "did not exclude the possibility that [he] would vote to impose the death penalty in other circumstances as well." Pet. App. 14a. The court further explained that, while it "owe[d] the trial judge deference because of his ability to observe demeanor," "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." *Id.* at 17a n.8. In the court's view, Deal's "clear words were that he could impose the death penalty and would follow the [trial] court's instructions; he never said anything to the contrary." *Ibid*; see *id.* at 21a n.10.

b. Judge Tallman, joined by four other judges, dissented from the denial of rehearing en banc. Pet. App. 23a-41a. Judge Tallman explained that Deal had "stated several times that his ability to impose the death penalty was dependent on whether the defendant was likely to re-offend." *Id.* at 28a-29a. And although Deal had also made statements indicating a willingness to impose a capital sentence, those statements were "accompanied by his indecisiveness and an expressed viewpoint" concerning the significance of whether the defendant might

kill again, "which, if followed, would result in the misapplication of Washington law." *Id.* at 37a. Judge Tallman noted that respondent's counsel had raised no objection to Deal's dismissal for cause, which indicated that "those who had the opportunity to watch [Deal's] testimony * * * felt that [he] was properly dismissed." *Id.* at 33a. In Judge Tallman's view, "[a]lthough some might find that [Deal] had eschewed and rejected his prior improper basis for application of the death penalty, a reasonable mind could just as easily find that he *had not* eschewed and rejected that basis." *Id.* at 37a. Judge Tallman thus concluded that the trial court's removal of Deal was "a reasonable judgment call made by the only judge who actually saw and heard [Deal] during voire dire." *Id.* at 28a.

SUMMARY OF ARGUMENT

A "prospective juror may be excluded for cause because of his * * * views on capital punishment" if "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks omitted). As this Court has emphasized, a reviewing court must accord substantial deference to a trial court's determination of whether to dismiss a prospective juror for cause under that standard. Determinations of juror bias turn on an assessment of the juror's credibility, and the trial court is uniquely positioned to assess the juror's credibility by viewing the juror's demeanor and hearing the juror's testimony. Moreover, the costs of overturning the trial court's assessment on appeal after a trial with an unbiased replacement juror are substantial.

In this case, the trial court reasonably determined that prospective juror Deal's views on capital punishment warranted his dismissal for cause, and the trial court's determination should have been sustained by the court of appeals (as it was indeed sustained by the Washington Supreme Court). Notwithstanding repeated efforts by counsel on both sides to explain to Deal that a defendant convicted of a capital crime under Washington law would have no possibility of release if spared a capital sentence, Deal indicated on several occasions that he would view the likelihood that a defendant would be released and commit murder again as a central consideration when assessing whether imposition of a capital sentence would be warranted. In that context, the trial court had ample basis for concluding that Deal's views on capital punishment would prevent or substantially impair his ability to adhere faithfully to applicable capital sentencing standards.

In holding that the trial court was barred from dismissing Deal for cause, and was so clearly barred that its action contradicted clearly established precedent of this Court, the court of appeals relied on Deal's affirmative answer of "Yes" on certain occasions when asked if he could follow the law and consider imposing a capital sentence. The court of appeals' approach is fundamentally misconceived. A trial court is not required to attach conclusive weight to a prospective juror's generic assertions that he will be able to follow the law. Such statements must be considered in context, and here, Deal's affirmative replies when asked if he could follow the law were surrounded by repeated indications that he would give pivotal weight to whether the defendant could be released and kill again.

Equally fundamentally, the trial court heard Deal's testimony and viewed his demeanor. The trial court thus was best situated to weigh Deal's assertions that he could follow the law against other statements he made during voir dire casting doubt on that assertion, and to evaluate which of those sets of responses would more likely shape Deal's performance of his functions as a juror. The absence of any objection by respondent to Deal's removal for cause reinforces the need to defer to the trial court, as it suggests that those who directly observed Deal's testimony were in agreement that it raised substantial questions about his ability to serve as an impartial juror in this case.

ARGUMENT

A REVIEWING COURT SHOULD GIVE SUBSTANTIAL DEFERENCE TO A TRIAL COURT'S DISMISSAL OF A PROSPECTIVE CAPITAL JUROR FOR CAUSE WHERE THE JUROR ASSERTS THAT HE COULD FOLLOW THE LAW AND IMPOSE A CAPITAL SENTENCE BUT EXPRESSES UNCERTAINTY ABOUT THE CIRCUMSTANCES IN WHICH HE COULD DO SO

This Court has long recognized that protection of a defendant's right to an "impartial jury," U.S. Const. Amend. VI, requires delicate determinations about juror bias that are uniquely suited for determination by the trial court. In a capital case, a judge must determine whether, whatever words the juror may speak about his ability to impose a death sentence, the juror's mind is in fact open to assessment of the facts under the correct legal standard. The court of appeals erred in this case in declining to apply principles of deferential review to the trial court's juror-bias determination and in refusing to allow a judge to remove a juror absent the juror's

express acknowledgment that he or she would be unable to follow the law.

A. Determinations About Juror Bias Based On Credibility Assessments Fall Uniquely Within The Trial Court's Province

1. As a means of enforcing the Sixth Amendment right to trial by an impartial jury, the Court has long endorsed a defendant's right to challenge a prospective juror for cause on the ground that the "juror has formed an opinion as to [an] issue to be tried." *Reynolds* v. *United States*, 98 U.S. 145, 155 (1878). The Court also has long made clear, as a corollary principle, that the "finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest." *Id.* at 156; see *Patton* v. *Yount*, 467 U.S. 1025, 1036-1038 (1984).

A reviewing court owes substantial deference to a trial court's determination concerning whether a potential juror should be dismissed for bias because "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words." *Reynolds*, 98 U.S. at 156-157. While the "manner of the juror" is "seen below," it "cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case." *Id.* at 157. A trial court's determination on juror bias "is essentially one of credibility, and therefore largely one of demeanor. As [the Court has] said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to special deference." *Patton*, 467 U.S. at 1038 (internal quotation marks omitted); accord *Thompson* v. *Keohane*, 516 U.S.

99, 111 (1995) (explaining that determinations concerning "juror impartiality" depend "heavily on the trial court's appraisal of witness credibility and demeanor," and the trial court therefore "is better positioned to make decisions of this genre").

2. Those principles are fully applicable to a trial court's determination in a capital case on whether a potential juror should be dismissed for cause based on his or her views about capital punishment. The Court first addressed the issue in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), holding that the defendant's right to an impartial jury had been infringed by application of an Illinois statute that allowed the dismissal of "any veniremen who expressed qualms about capital punishment." *Id.* at 513. The Court explained that a "man who opposes the death penalty" nonetheless "can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519. Accordingly, the Court held, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522.

Subsequently, in *Wainwright* v. *Witt*, 469 U.S. 412 (1985), the Court "clarif[ied] [its] decision in *Witherspoon*" and elaborated on "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." *Id.* at 424. "That standard," the Court established, "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Ibid.* (internal quotation marks omitted); *Darden* v.

Wainwright, 477 U.S. 168, 175 (1986). The Court explained that the standard "does not require that a juror's bias be proved with 'unmistakable clarity.'" *Witt*, 469 U.S. at 424.

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

Id. at 424-425.

The Court emphasized that, as is generally the case with respect to review of a trial court's determinations on juror bias, see pp. 16-17, *supra*, review of such determinations in the context of a capital case requires according considerable deference to the trial court. As the court explained, "[d]espite [a] lack of clarity in the printed record" concerning whether a juror's views on capital punishment would impair his or her ability to impose a capital sentence consistent with the law, "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." 469 U.S. at 425-426. And because the "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record," *id.* at 429, "deference must be paid to the trial judge who sees and hears the juror," *id.* at 426. The case for deference is particularly strong (and the costs of reversal particularly high) in a case like this where

the trial court has *granted* a motion to strike for cause, because there is no risk that a biased juror will actually sit.

B. The Trial Court's Decision In This Case To Dismiss Juror Deal For Cause Warrants Deference And Should Be Sustained

The record in this case supports the trial court's dismissal of juror Deal. The juror's responses, when he was apprised that Washington state law precluded the possibility of respondent's release, evinced sufficient uncertainty about the circumstances in which he could impose a death sentence that a trial court could reasonably find him unqualified to serve. And the court of appeals' conclusion, based only on a paper record, that the juror's statements that he could follow the law precluded his dismissal overlooked the full context of the juror's responses and ignored the trial court's superior ability to evaluate the juror's demeanor and credibility.

1. Juror Deal expressed uncertainty concerning whether he could impose a capital sentence when there is no possibility that the defendant could be released and again commit murder

In his responses to the jury questionnaire completed by prospective jurors, juror Deal stated that a capital sentence would be appropriate if it were proved that the defendant "has killed and would kill again." Pet. App. 235a. After Deal's voir dire, the prosecutor explained that the basis for his challenge to Deal was that he did not "think [Deal] said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again." *Id.* at 242a. The prosecutor believed that Deal "has some real problems with that," "is very confused," and "hadn't really

thought about" imposition of a capital sentence "if a person can't kill again" and "he's locked up for the rest of his life." *Id.* at 241a. Deal's statements in voir dire fully justified the trial court's decision to dismiss Deal for cause for the reasons explained by the prosecutor.

Deal's initial response on the questionnaire raised substantial questions about his fitness to serve, suggesting that he might view a capital sentence as appropriate only in circumstances that could not arise under state law, *i.e.*, if the defendant were released and might again commit murder. When initially advised by respondent's counsel that a capital defendant is "not ever eligible for parole," Deal responded, "I understand," and acknowledged that he was unaware "until this afternoon" that there would be no possibility of parole. Pet. App. 227a. But Deal stated almost immediately thereafter that "the type of situation" in which a capital sentence "would be appropriate" is if the defendant were "incorrigible and would reviolate if released." *Id.* at 228a. And when counsel then asked whether Deal would be "frustrated" that, in light of the absence of possibility of parole, "there is not a lot of likelihood that people are going to spend a lot of time talking about whether they're going to kill again," Deal responded, "I'm not sure." *Id.* at 228a-229a.

Deal expressed similar confusion and uncertainty when questioned by counsel for the State. When asked if he would "require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law" requires only proof beyond a reasonable doubt, Deal observed, "I guess it would have to be in my mind very obvious that the person would reoffend." Pet. App. 236a. The prosecutor later asked whether Deal would "find it difficult to vote for the death penalty given a

situation where he couldn't kill again," and Deal responded that "it wasn't until today that I became aware that we had a life without parole in the state of Washington." *Id.* at 238a. The prosecutor followed up by asking if Deal could "think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life." *Ibid.* Deal answered that he "would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." *Ibid.* Later, Deal observed that, if "parole is an option," he continued to believe in the "idea of him having to kill again to deserve the death penalty." *Id.* at 239a.

The upshot is that, throughout his voir dire examination, and notwithstanding repeated efforts by counsel on both sides to reiterate that the alternative to a capital sentence was a sentence of life with no possibility of parole, Deal continued to give indications that he would view the likelihood that a defendant could be released and commit another murder as a central—and perhaps the dispositive—consideration in deciding whether a capital sentence would be justified. Because Washington does not allow for release on parole of a person convicted of a capital crime, and because questions concerning whether the defendant might be released and kill again play no role under Washington law in the decision whether to impose a capital sentence, Deal's voir dire responses fully supported concluding that his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424 (internal quotation marks omitted).

It is true that, as the court of appeals observed, Deal never directly "stat[ed] that he might not be able" to

"follow the law and impose the death penalty" Pet. App. 10a n.5. But "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism," and a juror's bias therefore need not "be proved with 'unmistakable clarity.'" *Witt*, 469 U.S. at 424. Indeed, "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Id.* at 424-425; see *id.* at 425 ("veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings"). The trial judge in this case, who was in a position to hear Deal's responses and to observe his demeanor during his voir dire, had ample basis to agree with the prosecutor that Deal had not "overc[o]me this idea of he must kill again before he imposed the death penalty or be in a position to kill again." Pet. App. 242a.[2]

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[2] As respondent acknowledges, it is immaterial that the trial court neither gave a separate explanation setting forth its reasons for dismissing Deal nor made an explicit statement to the effect that Deal would be substantially impaired in his ability to follow the law. See Br. in Opp. 13 ("The trial court is not obligated to make a specific finding that the juror was substantially impaired so long as there is a basis in the record for drawing such a conclusion."). This Court has "decline[d] to require the judge to write out in a separate memorandum his specific findings on each juror excused," or "to announce for the record his conclusions that [a juror] was biased, or his reasoning," where the "finding is evident from the record." *Witt*, 469 U.S. at 430. Here, the prosecutor explained the basis for his challenge to Deal for cause, and the trial court may be presumed to have agreed with that basis when sustaining the prosecutor's challenge. See Pet. App. 241a-242a. That is especially the case in light of the statement of respondent's counsel that she had no objection to Deal's dismissal for cause, *id.* at 242a, which reinforced to the trial court that there was no need to elaborate further on

2. The court of appeals erred in requiring the trial court to give conclusive weight to Deal's statements that he could follow the law and impose a capital sentence

In concluding that the trial court was barred from dismissing juror Deal for cause, the court of appeals relied on certain of Deal's responses stating that he could follow the law and could consider imposing a capital sentence. The court of appeals' approach fails to consider those discrete responses in the context of Deal's voir dire as a whole, and fails to accord due weight to the trial court's firsthand ability to assess Deal's credibility and demeanor.

a. The court of appeals overturned the trial court's removal of Deal for cause, finding it "directly contrary to Supreme Court precedent," principally on the ground that Deal had responded on several occasions "that he could consider the death penalty as an option if told to do so." Pet. App. 10a, 19a; see *id.* at 13a-19a & nn.7, 10. The court emphasized that Deal "stated *six times* that he could follow the law and impose the death penalty." *Id.* at 10a n.5. "Most importantly," the court explained, Deal "promised he would 'follow the law' without reservation." *Id.* at 11a.

An approach that attaches conclusive weight to a juror's generic assertions of an ability to follow the law is fundamentally flawed. Neither a prosecutor nor a defense counsel seeking to determine whether there is cause to strike would limit the inquiry a single question about the juror's willingness to follow the law. The context matters. This Court accordingly has made clear that the "inquiry does not end with a mechanical recita-

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the reasons for sustaining the prosecutor's challenge. See *Witt*, 469 U.S. at 430-431.

tion of a single question and answer," but turns on the full "context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would 'substantially impair the performance of his duties as a juror' was fairly supported by the record." *Darden*, 477 U.S. at 176. The trial judge in this case adhered to those principles, explaining that there "is not any one particular response from any one of these jurors I think that is definitive for the most part. It[ ]s more of a total overall impression from everything that they have said." Pet. App. 35a.

From that perspective, although Deal gave affirmative replies when asked if he could consider imposing a capital sentence and follow the law, see Pet. App. 10a n.5, those responses were interspersed among repeated indications that he would attach substantial significance to whether "the person would reoffend." *Id.* at 236a; see pp. 20-21, *supra*. While the Ninth Circuit emphasized that Deal repeatedly stated that he could follow the law, see *id.* at 10a n.5, the court essentially ignored the intervening statements and confusion that led both the prosecutor and defense counsel repeatedly to seek that assurance.

For instance, immediately after answering, "Yes, I could," when asked if he "could consider both options" of a sentence of death and life imprisonment without parole, Deal stated that "the type of situation [in which a capital sentence] would be appropriate" is if the defendant "would reviolate if released." Pet. App. 228a. And although he likewise responded, "Yes, sir," when questioned if he could impose a capital sentence "where the man would never get out again," *id.* at 239a, that answer came directly after he was asked if he could "think of a time when you would be willing to impose a death pen-

alty since the person would be locked up for the rest of his life," and he acknowledged that he "would have to give that some thought." *Id.* at 238a. Indeed, the response that the court of appeals considered to be the "[m]ost important[]," *id.* at 11a—*i.e.*, Deal's answer of "Yes" when asked if he "would be willing to follow the law," *id.* at 236a-237a—pertained solely to his ability to abide by the reasonable-doubt standard, and thus shed no light on his ability fairly to consider a capital sentence where there is no possibility that the defendant could be released and murder again. *Id.* at 236a ("So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?").[3]

b. The court of appeals not only focused unduly on Deal's answers of "Yes" when asked if he could follow the law, without accounting for the context of his statements as a whole, but the court also believed that those responses justified discounting entirely the trial judge's

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[3] In any event, a general assertion of an ability to "follow the law," if accepted at face value, would often fail to account for particular biases that a juror may possess. For instance, the Court in *Witt* recounted the following colloquy between a trial judge and prospective juror:

> THE COURT: Will you follow the law that I give you?
>
> [A]: I could do that.
>
> THE COURT: What I am concerned about is that you indicated that you have a state of mind that might make you be unable to follow the law of this State.
>
> [A]: I could not bring back a death penalty.
>
> THE COURT: Step down.

Witt, 469 U.S. at 432 n.12 (brackets in original); see *Morgan* v. *Illinois*, 504 U.S. 719, 735 n.9 (1992) ("That certain prospective jurors maintain such inconsistent beliefs—that they can follow the law, but that they will always vote to impose death for conviction of a capital offense—has been demonstrated, even in this case.").

superior vantage point from which to assess Deal's credibility. See Pet. App. 17a n.7 ("but demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words"). Words that seem clear to a reviewing court when read on a transcript, however, may be seen in a different light by the trial judge who see and hears the testimony firsthand. See *Reynolds*, 98 U.S. at 156-157 ("[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion then his words. That is seen below, but cannot always be spread upon the record."); accord *Gomez* v. *United States*, 490 U.S. 858, 875 (1989) (The trial court "must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. But only words can be preserved for review; no transcript can recapture the atmosphere of *voir dire*.") (citations omitted).

The basis for deferring to a trial judge's credibility assessments is especially compelling in the circumstances of this case. Where, as here, a prospective juror gives certain responses that assert an ability to remain impartial but gives other responses that call his or her partiality into question, "only the trial judge could tell which of [the] answers was said with the greatest comprehension and certainty." *Patton*, 467 U.S. at 1040; see *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). There is thus all the more reason here to abide by the settled understanding that "the trial court's resolution of such questions is entitled, even on direct appeal, to special deference." *Patton*, 467 U.S. at 1038 (internal quotation marks omitted).

The need to pay deference to the trial court's assessment of Deal's ability to apply the law faithfully is reinforced by the absence of any objection by respondent's counsel to the removal of Deal for cause. See Pet. App. 242a. As this Court observed in rejecting a claim of improper exclusion of a potential capital juror in *Witt*, "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance [this Court] feel[s] justified in considering when assessing [the defendant's] claims." 469 U.S. at 431 n.11. Respondent's counsel had asked the trial court to reconsider the dismissal of at least one other prospective juror on the basis that the juror's bias had not been sufficiently shown. See Pet. App. 32a. Counsel's acquiescence in Deal's dismissal suggests that those who directly witnessed his voir dire were in agreement about his capacity to serve as an impartial juror. See *Witt*, 469 U.S. at 435 ("Indeed, from what appears on the record it seems that at the time Colby was excused no one in the courtroom questioned the fact that her beliefs prevented her from sitting. The reasons for this, although not crystal clear from the printed record, may well have been readily apparent to those viewing Colby as she answered the questions.").[4]

The court of appeals asserted that according deference to the trial court's conclusions on this record would

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[4] The court of appeals speculated that "the realities of the courtroom" support the view that defense counsel himself must have objected to Deal's pro-capital views and "thanked his lucky stars when the prosecutor bumped [Deal]." Pet. App. 18a-19a n.9. Nothing supports that attribution of views to respondent's trial counsel, however, other than the court of appeals' surmise. And to the extent that the majority's speculation were correct, it would make little sense to allow the defense to obtain relief based on an error that the defense invited for its own supposed tactical benefit.

mean that "not only is *Witherspoon* a dead letter, but all substantial evidence review of trial court factual findings is obsolete." Pet. App. 17a n.8. But giving a trial court latitude to reconcile conflicting indications about juror's ability to follow the law does not render appellate review impossible or ineffectual. Nor is there anything improper in recognizing that a juror's "facial expression or body language" might contradict the juror's "spoken words." *Ibid.* If a trial court's removal of a juror rested on observations of the juror's demeanor that cast doubt on the credibility of his otherwise-unimpeachable answers, an appellate court might expect to see some indication of that in the record. But here, where the juror's uncertainty and confusion triggered sustained voir dire by both sides, and formed the basis of an objection by the prosecutor that drew no response from defense counsel, an appellate court fulfills its proper role by deferring to the actors on the scene, rather than imagining for itself a perfectly qualified juror.

c. Contrary to the court of appeals' suggestion, see Pet. App. 13a & n.6, nothing in *Gray* v. *Mississippi*, 481 U.S. 648 (1987), supports requiring a trial court to give dispositive weight to a prospective juror's blanket assertion of an ability to consider a capital sentence. *Gray* principally concerned the question whether harmless-error analysis applies when a prospective juror in a capital case is erroneously excluded for cause. In the course of holding that harmless-error analysis is inapplicable, the Court noted its agreement with the unanimous conclusion of the Mississippi Supreme Court that the juror at issue should not have been excused for cause. See *id.* at 659. The Court did not suggest that the trial court was foreclosed from excusing the juror merely because she had stated that she could impose a capital sentence.

The Court instead operated on the understanding that the trial judge had himself "concluded that [the juror] was capable of voting to impose it," *id.* at 653, but had nonetheless excluded her for cause. Indeed, the Court in *Gray* observed that appropriate voir dire under the state law in question did not accept a blanket assertion of a juror's opposition to the death penalty as a basis for exclusion, but required follow-up questions to discern whether the juror's position was more nuanced. See *id.* at 662-663 & nn.11 & 12. By the same token, a blanket assertion of willingness to impose a capital sentence does not preclude determining that the juror in fact may be unwilling to impose a capital sentence in circumstances authorized by state law based on questioning that shows that his position may be more nuanced.

Gray therefore does not call into question a trial court's basic authority to dismiss a juror for cause notwithstanding the juror's assertion of impartiality, let alone suggest that a trial court must credit such an assertion in the face of other statements that indicate the juror's bias. See *Patton*, 467 U.S. at 1036 (explaining that inquiry into juror bias not only entails determining whether the juror swore "that he could set aside any opinion he might hold," but also requires assessing whether "the juror's protestation of impartiality [should be] believed"). To the contrary, the absence-of-harmless-error rule established by *Gray*—even when the jury ultimately empaneled is free of bias—only underscores the need for deference to a trial judge's reasonable context-based determination. When an error occurs, a new trial on penalty follows. But that remedy should require something more than an appellate court (let alone a habeas court) reaching a different conclusion on a paper record from that reached by the trial court

based on the full context of voir dire. *Witt* demands a degree of deference that the court of appeals did not give. The court of appeals in this case thus erred in concluding that the trial court was bound to conclude that Deal was fit to serve because he had stated that he could impose a capital sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JEFFREY UTTECHT, SUPERINTENDENT,
WASHINGTON STATE PENITENTIARY,

Petitioner,

—v.—

CAL COBURN BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. The Decision By The State Courts To Exclude Mr. Deal For Cause "Involved An Unreasonable Application of Clearly Established" Supreme Court Precedent 11

A. Even If Mr. Deal Would Have Been Less Inclined To Return A Death Verdict For A Parole-Ineligible Defendant, He Was Qualified To Serve Under This Court's Precedents 12

B. Washington Courts Unreasonably Applied This Court's Precedents By Determining Whether Mr. Deal Was Qualified To Serve Based Upon His Views Regarding The Death Penalty Rather Than His Ability To Follow The Law 17

II. Respondent Showed By Clear and Convincing Evidence That The State Courts' Factual Finding of Juror Bias Was Erroneous And, In Turn, That the State Courts' Finding Was An Unreasonable Determination Of The Facts. 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Adams v. Texas, 448 U.S. 38 (1980) 12, 19

Barefoot v. Estelle, 463 U.S. 880 (1983).....14

Clark v. State, 929 S.W.2d 5 (Tex. Crim. App. 1996) 21

Conde v. State, 860 So. 2d 930 (Fla. 2003).....22

Darden v. Wainwright, 477 U.S. 168 (1986).....18, 19

Durrough v. State, 620 S.W.2d 134
(Tex. Crim. App. 1981) 21

Eddings v. Oklahoma, 455 U.S. 104 (1982).....17

Farina v. State, 680 So. 2d 392 (Fla. 1996) 21

Franklin v. Lynaugh, 487 U.S. 164 (1988).....16

Gall v. Parker, 231 F.3d 265 (6th Cir. 2000).....20

Gray v. Mississippi, 481 U.S. 648 (1987) 9, 24

Jarrell v. State, 413 S.E.2d 710 (Ga. 1992).....21

Johnson v. State, 820 So. 2d 842 (Ala. Crim. App. 2000) ...21

Jurek v. Texas, 428 U.S. 262 (1976) 14

Kelly v. South Carolina, 534 U.S. 246 (2002).....15

Lockett v. Ohio, 438 U.S. 586 (1978).....16

Lockhart v. Fretwell, 506 U.S. 364 (1993).....16

Miller-El v. Dretke, 545 U.S. 231 (2005).....26

Mills v. Maryland, 486 U.S. 367 (1988).....17

Morgan v. Illinois, 504 U.S. 719 (1992) 12, 18, 19

People v. Heard, 75 P.3d 53 (Cal. 2003).....20

People v. Ledesma, 140 P.3d 657 (Cal. 2006).....21

Sallie v. State, 578 S.E.2d 444 (Ga. 2003) 22

Shafer v. South Carolina, 532 U.S. 36 (2001).....15

Simmons v. South Carolina, 512 U.S. 154 (1994).....15

Skipper v. South Carolina, 476 U.S. 1 (1986).....14

Soto v. Commonwealth, 139 S.W.3d 827 (Ky. 2004).....20, 22

State v. Bartholomew, 654 P.2d 1170 (Wash. 1982).....14

State v. Finch, 975 P.2d 967 (Wash. 1999).....14

State v. Gregory, 147 P.3d 1201 (Wash. 2006).....14, 16

State v. Juniors, 915 So. 2d 291 (La. 2005) 22

State v. Juniors, 915 So. 2d 291 (La. 2005), *cert. denied*, 126 S.Ct. 1940 (2006).....22

Strickland v. Washington, 466 U.S. 668 (1984).....15

Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001) 20

Threadgill v. State, 146 S.W.3d 654, 66-69 (Tex. Crim. App. 2004) 22

United States. v. Chanthadara, 230 F.3d 1237 (10th Cir. 2000).....20

Wainwright v. Witt, 469 U.S. 412 (1985) .....*passim*

Washington v. Bartholomew, 463 U.S. 1203 (1983).....14

Wiggins v. Smith, 539 U.S. 510 (2003) 15, 17, 22

Williams v. Taylor, 529 U.S. 362 (2000).....15, 17, 23

Statutes

28 U.S.C. § 2254(d)(1) 10, 15, 17, 23

28 U.S.C. § 2254(d)(2) 9, 11, 23, 26

28 U.S.C. § 2254(e)(1) 9, 11,23 24, 25, 26

Wash Rev. Code § 10.95.070 (8).....16

Wash. Rev. Code § 10.95.060(4).....15

Wash. Rev. Code Ann. § 10.95.070 17

Wash. Rev. Code Ann. § 10.95.070 (8) (West 2007).....14

Other Authorities

Mitzi Dorland and Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 Law & Psychol. Rev. 63 (Spring 2005) 13

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Washington is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving a serious question regarding the constitutional right of capital defendants to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution: may states exclude for cause prospective jurors based on their views regarding capital punishment without determining whether the jurors can follow the pertinent sentencing law? Given its longstanding interest in the constitutional right to a fair and impartial jury, the proper resolution of that question is a matter of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

Cal Coburn Brown was convicted of aggravated first-degree murder and sentenced to death by a Washington State jury on December 15, 1993. Pet. App. 105a.

Richard Deal was summoned as a prospective juror for the trial. Prior to learning about Washington's capital punishment scheme, Mr. Deal stated in his jury questionnaire, *inter alia*, that he was in favor of the death penalty if it was proved beyond a shadow of a doubt that the defendant had killed and would kill again. J.A. 62-63.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

During voir dire, defense counsel asked Mr. Deal for "an idea" of his "general feelings about the death penalty," and Mr. Deal responded: "I do believe in the death penalty in severe situations." J.A. 58. Mr. Deal continued:

> A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

J.A. 58-59.

Upon further questioning, Mr. Deal reiterated: "It would have to be a severe case. I guess I can't put a real line where that might be . . . ." J.A. 59. Defense counsel then asked: "I'm assuming that there would not be any case other than murder that you would think the death penalty would be appropriate[?]" J.A. 59. Mr. Deal replied: "I think that is correct." J.A. 59. Defense counsel continued:

> . . . [I]n Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that it was done in order to conceal a witness or eliminate a witness.
>
> Does that fall within the class of cases that you think the death penalty is appropriate?

J.A. 60. Mr. Deal replied: "I think that would be." J.A. 60.

Defense counsel then asked him, "how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?" J.A. 60. Mr. Deal replied: "I think that if a person is temporarily insane or things of that [sic] lead a person to do things that they would not normally do, I think that would enter into it." J.A. 61.

Defense counsel proceeded to ask Mr. Deal whether he had previously been aware that a life sentence in Washington is without parole, and Mr. Deal responded: "I did not [know that fact] until this afternoon." J.A. 61.

Defense counsel asked Mr. Deal if he could consider both a death sentence and a life sentence without parole. J.A. 61-62. Mr. Deal responded, "Yes, I could." *Id.*

Defense counsel then asked Mr. Deal to explain "why you think the death penalty is appropriate, what purpose it serves, that kind of thing?" J.A. 62. Mr. Deal explained the basis for his personal belief in the death penalty: "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62. Defense counsel responded to this statement of personal belief by asking Mr. Deal whether he "could consider either alterative" knowing what "you didn't know before . . . [that a defendant convicted of capital murder] is not going to get out of jail no matter which sentence you give" him. J.A. 62. Mr. Deal replied, "I believe so, yes." *Id.*

When defense counsel asked whether Mr. Deal would be "frustrated" if the parties at the penalty phase did not "spend a lot of time talking about whether or not" the defendant is "going to kill again," Mr. Deal responded, "I'm not sure." J.A. 62-63.

Defense counsel then asked Mr. Deal whether he thought the death penalty was used to too frequently or not enough in the United States. J.A. 63. He replied:

> It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. . . . I think in severe situations, it is appropriate.

J.A. 63. Defense counsel responded to this statement as follows: "It sounds like you're a little more comfortable that it is being used some of the time?" J.A. 63. Mr. Deal said, "Yes." *Id.* Defense counsel asked whether Mr. Deal had been unhappy when the death penalty was used less frequently, and Mr. Deal stated, "I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate." *Id.*

Defense counsel then sought to determine whether Mr. Deal could consider a life sentence in light of the state's aggravating factors. J.A. 64. Mr. Deal explained that he "could consider" a life sentence given the state's aggravating factors, but categorically refused to commit to returning a life sentence, explaining, "I don't know if I really have enough information to make a determination." J.A. 64.

Defense counsel asked Mr. Deal whether he could consider mental status evidence as mitigation even if the evidence did not show that the defendant was insane. J.A. 67. Mr. Deal responded, "Yes, I could." J.A. 67. Defense counsel asked Mr. Deal whether he could consider "somebody's childhood or their emotional development" as mitigating circumstances, and Mr. Deal replied: "I could consider it. I don't have strong feelings one way or the other." J.A. 67.

Mr. Deal then stated that he was willing to "accept the responsibility" of making the "important decision" whether the defendant should be sentenced to death or life imprisonment. J.A. 68.

Responding to the prosecutor's questioning, Mr. Deal confirmed that he had stated on his questionnaire that he favored the death penalty if it was proven beyond a shadow of a doubt that the defendant had killed and would kill again. J.A. 69. The prosecutor asked whether he had made this statement before reading his juror's handbook, and Mr. Deal responded affirmatively. *Id.* The prosecutor explained to Mr. Deal that he was "bother[ed]" by the phrase "beyond a shadow of a doubt," and that the state's burden was "beyond a reasonable doubt." *Id.* Mr. Deal initially expressed confusion when confronted with this distinction, responding, "I would have to know the, I'm at a loss for the words here." J.A. 70. He then stated, "I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70. The prosecutor responded that "we're not talking about that, sir," and then Mr. Deal corrected himself by stating, "Or was guilty, yes." J.A. 70. The prosecutor sought to ensure that Mr. Deal was referring to the defendant's guilt by stating, "So, we're talking about that?" *Id.* Mr. Deal said, "Yes." *Id.* When the prosecutor asked Mr. Deal whether he "would be satisfied with a reasonable doubt standard" and "would be willing to follow the law," Mr. Deal declared, "Yes." *Id.* When the prosecutor explained that "there is [sic] very few things in life absolutely certain," Mr. Deal replied, "I understand." *Id.*

The prosecutor turned to Mr. Deal's belief in capital punishment to ensure that murderers do not murder again. He asked Mr. Deal, "if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?" J.A. 71. Mr. Deal reiterated: "I made that statement more

under assumption [sic] that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington." J.A. 71. The prosecutor asked, "can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?" J.A. 71-72. Confronted just an hour before with correct information about Washington's capital sentencing scheme, Mr. Deal understandably responded, "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." J.A. 72. The prosecutor immediately acknowledged: "I realize this is put on you rather suddenly . . . ." *Id.* The prosecutor posed the following question:

> . . . I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.
>
> But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

Id. Mr. Deal answered: "Yes, sir." *Id.*

The prosecutor then asked Mr. Deal the following confusing and double-negative question: "So this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?" *Id.* Mr. Deal responded: "I do feel that way if parole is an option, without parole as an option. I believe in the death penalty.

Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure." J.A. 72-73.

The prosecutor then once again sought and obtained a pledge by Mr. Deal that he could consider and vote for the death penalty even if the defendant would never be paroled. The prosecutor asked, "But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?" J.A. 73. Mr. Deal responded, "I could consider it, yes." *Id.* The prosecutor responded, "Then could you impose it?" Mr. Deal stated: "I could if I was convinced that was the appropriate measure." *Id.*

The court proceeded to question Mr. Deal. The court did not inquire as to Mr. Deal's willingness to consider and impose a death sentence even if the defendant would never be released. Rather, the court asked Mr. Deal whether he now understood the difference between shadow of a doubt and beyond a reasonable doubt, and Mr. Deal explained, "The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or something over the years." J.A. 73-74. Mr. Deal added: "I guess the point I was making that it has to be – –." The court finished his sentence: "You would have to be positive?" Mr. Deal answered: "I would have to be positive, that's correct." J.A. 74. The court inquired, "The State has to convince you?" Mr. Deal responded, "Yes." *Id.* The court asked, "As they would have to convince any reasonable person?" Mr. Deal responded, "Yes." *Id.*

In moving to exclude Mr. Deal for cause, the prosecutor stated that he was not challenging him based upon his confusion about the television phrase, "shadow of a

doubt," because "I think he would certainly stick with the reasonable doubt standard. J.A. 75. The prosecutor moved to challenge Mr. Deal for cause because

> he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of [sic]. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

J.A. 75. Defense counsel did not object and the trial court granted the prosecutor's cause challenge without providing its reasons. J.A. 75.

On appeal, respondent challenged the exclusion of Mr. Deal under *Wainwright v. Witt*, 469 U.S. 412 (1985), and the Washington Supreme Court denied the claim as follows:

> Mr. Deal was properly excused. On voir dire he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The

> trial court did not abuse its discretion in excusing Mr. Deal for cause.

State v. Brown, 940 P.2d 546, 604 (Wash. 1997).

Subsequently, respondent petitioned for a writ of habeas corpus in federal court, claiming, *inter alia,* that Richard Deal had been unconstitutionally excluded from the jury due to his views regarding the death penalty. The district court denied the petition, ruling that there was "sufficient evidence to establish that each juror's views would 'prevent or substantially impair' his or her ability to carry out the duties imposed on jurors." Pet. 79a.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed. *Brown v. Lambert*, 451 F.3d 946, 955 (9th Cir. 2006).[2] The Court of Appeals stated that the Washington Supreme Court had not found that Mr. Deal was "unable to follow instructions" and that the state court could not have done so because Mr. Deal "ultimately stated that [he] could consider the death penalty in an appropriate case." *Brown*, 451 F.3d at 950-51 (citing *Gray v. Mississippi*, 481 U.S. 648, 653 (1987). The Court of Appeals determined that, had "there been a finding that [Mr. Deal] was 'substantially impaired' in his ability to follow the law, it would have been unreasonable." *Brown*, 451 F.3d at 951 (citing 28 U.S.C. §§ 2254(d)(2), (e)(1) (footnote omitted)). Further, the court held that the Washington Supreme Court's stated reasons for upholding Mr. Deal's exclusion were "misplaced and insufficient." *Brown*, 451 F.3d at 953.

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[2] The cited opinion replaced an earlier decision reported at 431 F.3d 661, which also reversed the district court's decision. A majority of the non-recused active judges of the Court of Appeals declined to rehear the case en banc. *Brown*, 451 F.3d at 947.

SUMMARY OF ARGUMENT

The Washington courts determined that Mr. Deal was "properly excused" because "[o]n voir dire he indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." *State v. Brown*, 940 P.2d 546, 604 (Wash. 1997). The courts' decision "involved an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1) for two reasons:

1. Even if the record reasonably could be read to indicate that Mr. Deal would have been more inclined to vote death for a parole-eligible capital defendant and less inclined to vote death for a parole-ineligible defendant, the Washington courts unreasonably applied this Court's precedents in finding that he was challengeable for cause. Such inclinations would not have prevented or substantially impaired the performance of Mr. Deal's duties in accordance with his instructions and oath. Capital defendants' future dangerousness or probable lack of future dangerousness is a statutorily-prescribed capital sentencing factor under Washington law. No state law limits capital jurors' consideration of this factor when deciding a defendant's fate. Additionally, such a limitation would not withstand constitutional scrutiny under this Court's precedents.

2. The Washington courts unreasonably applied this Court's precedents by determining whether Mr. Deal was biased based upon his views regarding capital punishment and not upon whether the record as a whole showed that "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424 (internal quotation marks and footnote omitted). A fair, complete and contextual reading of his voir dire demonstrates that Mr. Deal

would have been able to perform his duties in accordance with his instructions and oath, and would have been able to consider and impose a death sentence even when the defendant would never be released from prison.[3]

For these same reasons, respondent showed by clear and convincing evidence (provided by the record itself) that the state courts' factual finding of juror bias was erroneous for purposes of 28 U.S.C. § 2254(e)(1), and that the state's erroneous factual determination, in turn, "resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" within the meaning of 28 U.S.C. § 2254(d)(2).

ARGUMENT

I. THE DECISION BY THE STATE COURTS TO EXCLUDE MR. DEAL FOR CAUSE "INVOLVED AN UNREASONBLE APPLICATION OF CLEARLY ESTABLISHED" SUPREME COURT PRECEDENT.

As recognized by both the Washington state courts and the Court of Appeals for the Ninth Circuit, this Court's decision in *Wainright v. Witt*, 469 U.S. 412 (1985), and its progeny governed the state courts' ruling on the prosecution's challenge for cause of Mr. Deal. As shown below, the Washington courts' decisions were an unreasonable application of United States Supreme Court precedent for two reasons.

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[3] As shown in the Statement of the Facts, *supra*, during voir dire, Mr. Deal repeated four times that he believed in the death penalty in severe cases. J.A. 58, 58-59, 59, 63. He also repeated four times that he could impose the death penalty even if the defendant would never be released from prison. J.A. 61-62, 62, 72, 73.

A. EVEN IF MR. DEAL WOULD HAVE BEEN LESS INCLINED TO RETURN A DEATH VERDICT FOR A PAROLE-INELIGIBLE DEFENDANT, HE WAS QUALIFIED TO SERVE UNDER THIS COURT'S PRECEDENTS.

Neither Mr. Deal's strong personal support for the death penalty to prevent recidivist murders nor his alleged inclination to consider a defendant's lack of future dangerousness when determining whether a death sentence is appropriate justified his excusal under *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), and its progeny.

In *Witt*, 469 U.S. at 424, this Court held that the standard for juror exclusion for cause is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *See also Adams v. Texas*, 448 U.S. 38, 45 (1980) (constitutional test for cause exclusion is whether juror's views "would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with [the] instructions and [the] oath"). Thus, the question under *Witt* is the prospective juror's "ability to follow the [pertinent state's capital punishment] law." *Morgan v. Illinois*, 504 U.S. 719, 734 n.8 (1992). Although it is the prerogative of the states to enact and interpret their own capital sentencing laws, *Witt* clearly establishes that the Sixth and Fourteenth Amendments prohibit states from excusing prospective jurors for cause without determining that they are unable to follow the relevant state law. *Witt*, 469 U.S. at 423-24.

The Washington courts failed to address Mr. Deal's ability to follow Washington's capital punishment law, *see Brown*, 940 P.2d at 604,[4] and, thus, unreasonably applied

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[4] The Washington Supreme Court confined its cursory analysis to whether Mr. Deal could correctly *state* the law, and failed to analyze whether he could *follow* the law.

Adams, Witt and *Morgan*. Had the Washington courts considered the question dictated by these precedents, they would have analyzed Mr. Deal's statements during voir dire in the context of Washington's capital punishment scheme, including the central importance in the scheme of future dangerousness and lack of probable future dangerousness, and would have concluded that Mr. Deal was fully able to follow Washington law.

Certainly, Mr. Deal's expressions of strong personal support for the death penalty to prevent recidivist murders did not render him unable to follow Washington's capital law and, thus, constitutionally unqualified to serve under *Adams*, *Witt* and *Morgan*. *See also* Point I (B), *infra* (demonstrating that Washington courts unreasonably applied this Court's precedents by considering only Mr. Deal's views on the death penalty instead of his ability to follow the law). In addition, as demonstrated below, Mr. Deal was qualified under this Court's precedents even if the record supported the contention that he "indicated on several occasions that he would view the likelihood that a defendant would be released and commit murder again as a central consideration when assessing whether imposition of a capital sentence would be warranted."[5] Amicus Br. for United States at 14-15; *see also id.* at 23.[6]

Like numerous other states[7] and as permitted by this

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[5] By "a central consideration," we understand the government to mean one highly significant consideration, among others.

[6] In fact, as demonstrated in the Statement of the Facts, *supra*, a fair, complete and contextual reading of his voir dire demonstrates that Mr. Deal could consider and impose a death sentence even if the defendant would never be released from prison.

[7] *See* Mitzi Dorland and Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 Law & Psychol. Rev. 63, 64 (Spring 2005) ("Of the thirty-eight states with death penalty statutes, at least twenty-one now include a defendant's potential for future violence among

Court's precedents,[8] the State of Washington recognizes future dangerousness as a legitimate sentencing consideration in capital cases. One of the state statutory provisions governing capital trials states that "[i]n deciding [whether to impose a sentence of death] the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to . . . [w]hether there is a likelihood that the defendant will pose a danger to others in the future." Wash. Rev. Code Ann. § 10.95.070 (8) (West 2007).[9] The Washington Supreme Court has construed this statute to mean that "future dangerousness or the probable lack of future dangerousness of the defendant is a relevant factor for a jury's consideration in deciding whether to impose a death sentence. In the penalty phase of a capital trial, the jury knows the defendant is a convicted felon. But the extent to which he continues to be dangerous is *a central issue the jury must decide* in determining his sentence." *State v. Finch*, 975 P.2d 967, 1008 (Wash. 1999) (internal quotation marks and citation omitted) (emphasis added). *See also State v. Gregory*, 147 P.3d 1201, 1257 n.46 (Wash. 2006) ("future dangerousness or the probable lack of future dangerousness of the defendant is a relevant factor for a jury's consideration at the penalty phase") (internal quotation marks and citations omitted).[10] No state law limits capital jurors' consideration

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the aggravating factors to be considered in death sentencing.") (footnotes omitted).

[8] *See, e.g., Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (rejecting claim that future dangerousness was an invalid consideration in imposing the death penalty); *Barefoot v. Estelle*, 463 U.S. 880, 896-97 (1983) ("likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty").

[9] This statutory provision was enacted in 1981. It first appeared in the court's jurisprudence in 1982. *See State v. Bartholomew*, 654 P.2d 1170, 1181 n.1 (Wash. 1982), *vacated on other grounds sub nom., Washington v. Bartholomew*, 463 U.S. 1203 (1983).

[10] *See also Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (under Eighth Amendment, "evidence that the defendant would not pose a danger if

of this factor when deciding a defendant's fate.

Petitioner contends that the "*only* . . . statutory question" for capital jurors is whether they are "'convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency[.]'" Pet. Br. at 38 (quoting Wash. Rev. Code § 10.95.060(4) (emphasis added)). However, Washington law permits capital jurors to make the determination of whether there are "sufficient mitigating circumstances to merit leniency" by considering future dangerousness and the probable lack of future dangerousness. Wash. Rev. Code § 10.95.070 (8). It is thus entirely appropriate for a capital juror in Washington to consider future dangerousness or the probable lack of future dangerousness in deciding a capital defendant's fate. And no Washington law limits capital jurors' consideration of this factor. Like all capital jurors in the State of Washington, Mr. Deal was entitled to consider the likelihood that the defendant would commit further crimes when determining the appropriate sentence.

Because the Washington courts failed to determine that Mr. Deal could not follow Washington law, the state courts' decisions "involved an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1). *Cf. Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (finding state court decision rejecting ineffective assistance of counsel claim an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), where state court deferred to trial counsel's "strategic" decisions based on inadequate investigation); *Williams v. Taylor*, 529 U.S. 362, 397-98

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spared (but incarcerated) must be considered potentially mitigating"). *Cf. Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994) (plurality opinion) (parole ineligibility is relevant to the issue of a capital defendant's future dangerousness); *Kelly v. South Carolina*, 534 U.S. 246, 257 (2002) (same); *Shafer v. South Carolina*, 532 U.S. 36, 49 (2001) (same).

(2000) (finding unreasonable application of *Strickland*, 466 U.S. at 684, where state court failed to consider mitigation evidence in determining *Strickland*'s prejudice prong, and where its analysis turned on the narrow exception set forth in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), rather than *Strickland's* reasonable probability test).

Furthermore, the Washington Supreme Court's holding in this case cannot plausibly be read to effect a radical, one-time reversal of the state's long-standing rule that future dangerousness and a probable lack of future dangerousness are proper considerations for capital jurors in that state and that jurors may give these statutory sentencing factors the weight they deem appropriate. *Cf.* Amicus Br. for United States at 14-15, 23 (arguing that the Washington courts excluded Mr. Deal because he would have wrongfully accorded lack of future dangerousness too much mitigating weight). For one thing, nothing in the court's opinion evinces an intent to effect such a monumental change. Moreover, as explained above, Wash. Rev. Code Ann. § 10.95.070 was enacted in 1981, the court first cited it in 1982 and, as recently as 2006, the court reiterated that "future dangerousness or the probable lack of future dangerousness of the defendant is a relevant factor for a jury's consideration at the penalty phase." *Gregory*, 147 P.3d at 1257 n.46.

In any event, under this Court's precedents, the Eighth Amendment would prohibit Washington from limiting capital jurors' authority to consider and determine the weight of a defendant's mitigating factors, including a probable lack of future dangerousness. The Eighth Amendment "guarantees a defendant facing a possible death sentence . . . the right to consideration of" his mitigating factors "by the sentencing authority." *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)). *Lockett* established that a State may not prevent the capital sentencer "from giving

independent mitigating weight" to a defendant's mitigating factors. 438 U.S. at 605. Under *Lockett* and its progeny, the "sentencer determine[s] the weight to be given relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982); *see also id.* at 115 n.10; *Mills v. Maryland*, 486 U.S. 367, 376 n.8 (1988) (under Eighth Amendment, it is in "jury's discretion [to] attach[] significance to the presence of mitigating circumstances").

Thus, if the Washington Supreme Court's decision in this case is somehow construed to effect a radical, one-time reversal of the state's long-standing rule that future dangerousness and a probable lack of future dangerousness are proper considerations for capital jurors in that state and that jurors may give these statutory sentencing factors the weight they deem appropriate, the decision unreasonably applied *Lockett* and its progeny. *Cf. Wiggins*, 539 U.S. at 527; *Williams*, 529 U.S. at 397-98. So construed, the court's decision would "involve[] an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1).

B. WASHINGTON COURTS UNREASONABLY APPLIED THIS COURT'S PRECEDENTS BY DETERMINING WHETHER MR. DEAL WAS QUALIFIED TO SERVE BASED UPON HIS VIEWS REGARDING THE DEATH PENALTY RATHER THAN HIS ABILITY TO FOLLOW THE LAW.

The Washington Supreme Court's decision also was an unreasonable application of this Court's precedents because the court determined Mr. Deal was biased based upon his views regarding the death penalty and ignored his repeatedly-expressed willingness to follow the law and impose a death sentence in appropriate circumstances, even if the defendant would never be released. *See Brown*, 940 P.2d at 604 (listing beliefs about death penalty stated by Mr. Deal during voir dire and ignoring his repeatedly-stated ability to

follow the law).[11] Under this Court's case law, the appropriate inquiry is not focused on prospective jurors' views about the death penalty, but rather their ability to perform their duties in accordance with the law, judicial instructions, and their oath. *See Witt*, 469 U.S. at 424 ("Th[e] standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"). The state courts unreasonably failed to employ that standard in this case.

The distinction between a juror's views regarding the death penalty and his or her ability to follow the law is clearly established by *Adams v. Texas*, 448 U.S. 38 (1980), *Witt*, 469 U.S. at 424, *Darden v. Wainwright*, 477 U.S. 168, 178 (1986), and *Morgan v. Illinois*, 504 U.S. 719 (1992). In *Adams*, this Court reversed petitioner's death sentence because prospective jurors at his trial were improperly excused for cause based upon their views against capital punishment. The Court stated that the constitutional test for cause exclusion is not whether jurors opposed capital punishment but whether their views "would prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions] and [their] oath." 448 U.S. at 45. The Court also stated that an "inability to deny or confirm any effect whatsoever [of the prospective juror's views of capital punishment] is [not] equivalent to an unwillingness or an inability on the part of

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[11] The Washington Supreme Court also noted Mr. Deal's statement in his jury questionnaire referencing proof "'beyond a shadow of a doubt.'" *Brown*, 940 P.2d at 604. Neither the prosecutor at trial nor Petitioner in this Court assert that this misstatement of law -- made before Deal had been instructed that the burden is beyond a reasonable doubt and agreed to apply the correct standard – rendered Mr. Deal excludable for cause. *See, e.g.*, J.A. 75 (prosecutor moving to challenge Mr. Deal for cause "not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard").

the jurors to follow the court's instructions and obey their oaths," and that Texas had improperly excluded for cause jurors "whose only fault was . . . to acknowledge honestly that they might or might not be affected" by the prospect of imposing a death sentence. *Id.* at 50-51.

In *Witt*, the Court explicitly adopted the *Adams* test, holding that the standard for juror exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U.S. at 424. The Court made clear that the appropriate inquiry cannot be limited to a mechanical recitation of a single question and answer. *Id.* at 424-26. In *Darden*, the Court reiterated this test and explained that the determination of whether a trial court improperly granted a prosecution cause challenge under *Witt* must involve an examination of "the context surrounding" the juror's exclusion. 477 U.S. at 176. In *Morgan*, the Court applied this test to defense challenges for cause of prospective jurors based on their views regarding capital punishment. 504 U.S. at 728.

Under *Adams*, *Witt*, *Darden* and *Morgan*, a court must not simply inquire whether jurors' feelings and beliefs regarding capital punishment conform to the law, but also must determine whether those feelings and beliefs would prevent or substantially impair the juror from following the law. Here, the *only* inquiry made by the Washington Supreme Court was whether Mr. Deal's beliefs regarding capital punishment correctly stated the law. *See Brown*, 940 P.2d at 604. Under this Court's precedents, beliefs stated during voir dire by prospective jurors about capital punishment do not determine their qualifications to serve. Intuitively knowing and agreeing personally with capital sentencing law is not a prerequisite for jury service. When s/he sits down in the jury box, a prospective capital juror need not be able to articulate when imposing a death sentence

would be legally authorized. Moreover, the parties and the courts rightfully expect prospective jurors to speak with candor concerning their feelings about the death penalty (and any other pertinent issue) during the jury selection process. As one state court has noted,

> Voir dire examination occurs when a prospective juror quite properly has little or no information about the facts of the case and only the most vague idea as to the applicable law.

Soto v. Commonwealth, 139 S.W.3d 827, 848-49 (Ky. 2004).

Numerous courts recognize that under this Court's precedent the relevant inquiry is not whether prospective jurors' beliefs regarding capital punishment conform to the law, but whether they can put aside those beliefs and fairly apply the law. *See, e.g., Szuchon v. Lehman*, 273 F.3d 299, 329 (3d Cir. 2001) (reversing when a juror was "barred from jury service because of [his] views about capital punishment . . . . [, not because of his] inability to follow the law or abide by [his] oath[]"); *Gall v. Parker*, 231 F.3d 265, 330-31 (6th Cir. 2000) (reversing where prospective juror's "discomfort with the death penalty did not appear to 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'"); *United States. v. Chanthadara*, 230 F.3d 1237, 1272 (10th Cir. 2000) (vacating sentence where the trial court "failed to clarify prior to excusing [prospective juror] for cause that she opposed the death penalty to a degree which would have made it impossible for [her] to follow the law") (internal citations and quotation marks omitted); *People v. Heard*, 75 P.3d 53, 64 (Cal. 2003) ("In view of [prospective juror's] clarification of his views during voir dire, we conclude that his earlier juror questionnaire response, given without the benefit of the trial court's explanation of the governing legal principles, does not provide an adequate basis to support [his] excusal for

cause."); *Farina v. State*, 680 So. 2d 392, 398 (Fla. 1996) (reversing death sentence where, although prospective juror "may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath"); *Jarrell v. State*, 413 S.E.2d 710, 712 (Ga. 1992) (reversing where the evidence showed that prospective juror had "qualms" about imposing the death penalty, not that she was unable to follow the law); *Clark v. State*, 929 S.W.2d 5, 10 (Tex. Crim. App. 1996) (reversing where prospective juror with religious scruples against the death penalty was struck for cause without sufficient "inquiry whether" she could follow Texas law "and answer the special issues without conscious distortion or bias"); *Durrough v. State*, 620 S.W.2d 134, 142 (Tex. Crim. App. 1981) (reversing where prospective juror who had conscientious scruples against capital punishment repeatedly stated that she could answer the questions put to her based on the evidence presented at punishment phase of trial).

Indeed, courts virtually always deny defense cause challenges to prospective jurors who personally favor the death penalty in all murder cases, but who, like Mr. Deal, make clear that they can follow the law once the law is explained to them. *See, e.g., Johnson v. State*, 820 So. 2d 842, 853-55 (Ala. Crim. App. 2000) (rejecting defendant's argument that trial court erred by denying his cause challenges to prospective juror who favored an "eye for an eye" and to similar prospective jurors, and noting that "jurors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the court"); *People v. Ledesma*, 140 P.3d 657, 672-75 (Cal. 2006) (affirming denial of challenges to several prospective jurors who were strongly in favor of the death penalty, including one who said that "anyone who intentionally kills another person automatically should

receive the death penalty and that he would not be willing to give weight to the defendant's background"); *Conde v. State*, 860 So. 2d 930, 939, 941 (Fla. 2003) (affirming denial of cause challenge to prospective juror who initially said she "would automatically be in favor of the death penalty" and to one who initially said "he felt the death penalty should be mandatory in some circumstances"); *Sallie v. State*, 578 S.E.2d 444, 508 (Ga. 2003) (affirming denial of cause challenge to juror who initially said that "if someone committed murder he should get the death penalty and that he believed in an eye for an eye"); *Soto*, 139 S.W.3d at 849 (affirming denial of challenge to prospective juror who initially said she was in favor of an eye for an eye); *State v. Juniors*, 915 So. 2d 291, 310 (La. 2005) (affirming denial of cause challenge to prospective juror who initially said he believed in an eye for an eye and that "if you kill somebody, you don't deserve to live"), *cert. denied*, 126 S.Ct. 1940 (2006); *Threadgill v. State*, 146 S.W.3d 654, 66-69 (Tex. Crim. App. 2004) (affirming denial of challenge to prospective juror who initially said that "no one should be allowed to live for killing someone else").

The Washington Supreme Court's decision was an unreasonable application of *Adams*, *Witt*, *Darden* and *Morgan* because the court determined that Mr. Deal was biased based upon his views regarding the death penalty and ignored his repeatedly-expressed willingness to follow the law and impose a death sentence in appropriate circumstances, even if the defendant would never be released. *See Brown*, 940 P.2d at 604. Like the prospective jurors in the above-cited cases, Mr. Deal explained his personal views regarding the death penalty, but repeatedly made clear that he could consider and impose a death sentence under the law as instructed, including when the defendant would never be released. J.A. 60, 61-62, 62, 72, 73.

By making their determination solely on the basis of Mr. Deal's stated views about capital punishment, the Washington courts utilized a standard contrary to this Court's precedents and, thus, their decisions "involved an unreasonable application of clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1). *See Wiggins*, 539 U.S. at 527; *Williams*, 529 U.S. at 397-98 (finding unreasonable application of clearly-established federal law where state courts' analysis turned on wrong standard of review for ineffective assistance of counsel claim).

II. RESPONDENT SHOWED BY CLEAR AND CONVINCING EVIDENCE THAT THE STATE COURTS' FACTUAL FINDING OF JUROR BIAS WAS ERRONEOUS AND, IN TURN, THAT THE STATE COURTS' FINDING WAS AN UNREASONABLE DETERMINATION OF THE FACTS.

Respondent Brown showed by clear and convincing evidence (provided by the record itself) that the state courts' finding of juror bias was erroneous for purposes of 28 U.S.C. § 2254(e)(1). In turn, the state's erroneous determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" within the meaning of 28 U.S.C. § 2254(d)(2).

The record in this case contains no evidence that Mr. Deal was biased against the prosecution as this Court has construed the meaning of bias in the capital context. *See* Point I, *supra*. The state courts' finding of juror bias was unreasonable under 28 U.S.C. § 2254(d)(2) and erroneous for purposes of 28 U.S.C. § 2254(e)(1) for the same reasons that the state court unreasonably applied this Court's precedents for purposes of 28 U.S.C. § 2254(d)(1). *See* Point I, *supra*. Most specifically, the state courts' factual finding of juror bias was erroneous because Mr. Deal's views regarding

capital punishment did not prevent or substantially impair him from following Washington's capital punishment scheme.

That the state courts' finding of bias was erroneous under 2254(e)(1) is readily apparent when Mr. Deal's voir dire is compared with the voir dire of the juror who this Court found biased in *Wainwright v. Witt*, *supra*, and the voir dire of the juror who this Court found sufficiently impartial in *Gray v. Mississippi*, 481 U.S. 648 (1987).

Here is the pertinent voir dire of the unqualified prospective juror in *Witt*:

> "[Q. Prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> "[A. Colby:] I am afraid personally but not-
>
> "[Q]: Speak up, please.
>
> "[A]: I am afraid of being a little personal, but definitely not religious.
>
> "[Q]: Now, would that interfere with you sitting as a juror in this case?
>
> "[A]: I am afraid it would.
>
> "[Q]: You are afraid it would?
>
> "[A]: Yes, Sir.
>
> "[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> "[A]: I think so.
>
> "[Q]: You think it would.
>
> "[A]: I think it would.

"[Q]: Your honor, I would move for cause at this point.

"THE COURT: All right. Step down."

Witt, 469 U.S. at 415-16. The difference between the views of this juror in *Witt* and the views of Mr. Deal could not be starker. The above exchange, short though it was, obviously established a sound predicate for a finding that the prospective juror was substantially impaired in her ability to follow the law. Here, in sharp contrast to *Witt*, the record plainly and unambiguously establishes that Mr. Deal was more than willing to convict and impose a death sentence – so long as the State met its burden of demonstrating to him that it "was the appropriate measure." J.A. 73.

The voir dire in *Gray* also demonstrates that the state court's finding of bias in this case was erroneous under 28 U.S.C. § 2254(e)(1). In *Gray*, this Court agreed with the Mississippi Supreme Court that the trial court had erred by granting the prosecution's challenge for cause of a prospective juror. 481 U.S. at 659. As this Court explained, "Although the voir dire of member Bounds was somewhat confused, she ultimately stated that she could consider the death penalty in an appropriate case . . ." *Id.* at 653. Similarly, Mr. Deal stated that he could consider – and indeed that he could impose – the death penalty in an appropriate case. J.A. 60, 62, 72, 73. Thus, both *Witt* and *Gray* serve to establish that the state courts' finding of juror bias was erroneous for purpose of 28 U.S.C. § 2254(e)(1).

The Washington courts' error is also amply demonstrated by comparisons with the lower court decisions addressing trial court's findings of bias set forth in Point I.B, *supra*. These cases, particularly those upholding trial court decisions denying defense cause challenges under *Morgan*, underscore the unreasonableness of the trial court's factual determination that Mr. Deal was not qualified to serve.

Courts routinely deny defense cause challenges when jurors initially insist on "an eye for an eye" in all murder cases, and then, after the law is explained to them, assert that they can follow the law. Why did the Washington courts fail to employ this same standard in this case? The record provides no answer. Rather, clear and convincing evidence – Mr. Deal's repeated and uncontradicted assurances that he could follow the law – rebuts the state court finding that he was unqualified to serve by clear and convincing evidence and shows that finding to be unreasonable. 28 U.S.C. § § 2254(d)(2), 2254(e)(1). *See Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (discrediting under these statutory habeas standards prosecutor's denial that he struck jurors because of their race based on "'how reasonable, or how improbable, the [prosecutor's] explanations'" were in light of the contrary facts in the record).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

Jeffrey A. Uttecht,

Petitioner,

v.

Cal Coburn Brown,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 4
I. Limitations On Striking Jurors For Cause Based On Their Views About The Death Penalty Are Necessary To Preserve The Integrity And Representativeness Of Capital Juries. 4
II. The Dismissal Of Juror Deal Was Unconstitutional And Warranted Habeas Relief 9
A. The State Courts' Dismissal Of Juror Deal Was Based Upon A Fundamental Misconstruction Of This Court's Decisions 9
1. Deal's Misarticulation Of The Burden Of Proof Was Not A Legitimate Basis For Dismissal. 9
2. Deal's Indication That He Would Give Substantial Weight To Whether The Defendant Might Kill Again Was Not A Legitimate Basis For Dismissal. 10
B. There Was No Reasonable Basis For The State Courts To Conclude That Deal Was Unwilling To Consider The Death Penalty. 15
CONCLUSION 20

TABLE OF AUTHORITIES

Federal Cases

Adams v. Texas, 448 U.S. 38 (1980) 4, 7, 13, 14
Calderon v. Coleman, 525 U.S. 141 (1998) 16
Duncan v. Louisiana, 391 U.S. 145 (1968) 5
Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952) 18
Eddings v. Oklahoma, 455 U.S. 104 (1982) 12
Gray v. Mississippi, 481 U.S. 648 (1987) 6, 7, 11, 14
Gregg v. Georgia, 428 U.S. 153 (1976) 6
Irvin v. Dowd, 366 U.S. 717 (1961) 4
Lockhart v. McCree, 476 U.S. 162 (1986) 7, 13
Miller-El v. Cockrell, 537 U.S. 322 (2003) 18
Morgan v. Illinois, 504 U.S. 719 (1992) 8
Patton v. Yount, 467 U.S. 1025 (1984) 14
Ring v. Arizona, 536 U.S. 584 (2002) 5
Skipper v. South Carolina, 476 U.S. 1 (1986) 12, 14
Smith v. Texas, 543 U.S. 37 (2004) 12
Taylor v. Louisiana, 419 U.S. 522 (1975) 6, 7
Wainwright v. Witt, 469 U.S. 412 (1985) ..... passim
Witherspoon v. Illinois, 391 U.S. 510 (1968) ..... passim

State Cases

State v. Finch, 137 Wash. 2d 792 (Wash. 1999) 12
State v. Gentry, 125 Wash. 2d 570 (Wash. 1995) 12

Federal Statutes

28 U.S.C. § 2254(d)(1) 9
28 U.S.C. § 2254(d)(2) 9, 18

State Statutes

Wash. Rev. Code § 10.95.030 11
Wash. Rev. Code § 10.95.060(4) 2
Wash. Rev. Code § 10.95.070(8) 2, 11, 14

Other Authorities

Joseph Carroll, Gallup Poll: Who Supports the Death Penalty? (Nov. 16, 2004) 6

Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 7 (Stephen P. Garvey ed., 2003) 6

Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982) 5

Susan D. Rozelle, *The Utility of* Witt*: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677 (2002) 4

Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176 (1973) 6

INTEREST OF *AMICUS CURIAE*

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 10,000 attorneys nationwide, along with eighty state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice.[1]

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court has long recognized that the practice of death qualification, excluding individuals from capital juries based on their beliefs about the death penalty, must be strictly circumscribed in order to ensure a fair trial for the accused and to preserve the jury's historic role as the community's representative in rendering the gravest decision the criminal justice system is ever called upon to make. Both this Court's decisions and empirical studies reflect that the liberal dismissal of jurors who express reservations about capital punishment in general, or a reluctance to impose it except in restricted circumstances, skews capital juries toward death and undermines the representative nature of the jury and, thereby, public confidence in the capital sentencing process.

To balance these risks against the State's legitimate interest in removing jurors who are unwilling to follow the law, this Court established in *Wainwright v. Witt*, 469 U.S. 412 (1985), that a juror may not be excused for cause based on his views on capital punishment unless the prosecution demonstrates that those views prevent or substantially impair his ability to do his duty as a juror and follow his oath. In Washington, as in many states, that duty entails the exercise of substantial judgment and discretion about when death is appropriate or leniency warranted. In fact, by statute, a Washington jury is simply asked whether "sufficient mitigating circumstances merit leniency." Wash. Rev. Code § 10.95.060(4). In making that determination, the jury may consider any fact in mitigation, including "[w]hether there is a likelihood that the defendant will pose a danger to others in the future." *Id.* § 10.95.070(8). Only if a juror is incapable of exercising that broad discretion may he be dismissed for cause under *Witt*.

In this case, the trial court dismissed juror Richard Deal after the prosecution objected that Deal "never overcame [the] idea that [the defendant] must kill again . . . or be in a position to kill again" in order to warrant a death sentence. Pet. App. 241a-242a. Although Deal repeatedly expressed his

willingness and ability to consider either life or death as a possible sentence, the state supreme court upheld the dismissal. It did so principally on the ground that Deal's reluctance to vote for death in the absence of a risk of re-offense was, in that court's view, inconsistent with state law, which requires that those not sentenced to death be subject to life imprisonment without possibility of parole. The Ninth Circuit properly concluded that this decision constituted an unreasonable application of this Court's settled precedents.

Juror Deal's statements reflected nothing more than his belief that a lack of future dangerousness is an important mitigating factor counseling against imposition of the death penalty. Washington law expressly permits a juror to decline to impose the death penalty in light of that consideration. Moreover, Deal's views did not preclude him from considering death as a possible sentence, as he repeatedly and directly affirmed. Even if there is no prospect that a defendant charged with aggravated murder will ever be released into the community, he may nonetheless pose a risk to other inmates or prison officials while incarcerated. Deal made quite clear that if such a risk were proven, he would likely conclude that the death penalty was appropriate.

Nor can petitioner defend the trial court's ruling based solely on speculation that demeanor evidence, not apparent in ths record, provided the court with substantial grounds to doubt Deal's ability to follow the law. Neither court below indicated that it was basing its decision on anything other than the plain import of Deal's verbal answers as reflected in the transcript. Those answers plainly provided no constitutionally adequate ground for dismissal. To nonetheless withhold habeas relief because of the hypothetical possibility that the trial court could have found, without mentioning, that Deal's demeanor told a different story than his words, would effectively eliminate the Great Writ as a remedy for Sixth Amendment violations in the jury selection process.

ARGUMENT

I. Limitations On Striking Jurors For Cause Based On Their Views About The Death Penalty Are Necessary To Preserve The Integrity And Representativeness Of Capital Juries.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), this Court established the constitutional balance between a state's legitimate interest in excluding jurors unable to perform their duties in capital cases and defendants' right to an impartial jury capable of expressing the broader community's judgment concerning life and death. Lax enforcement of the resulting constitutional standard threatens to undermine the fairness of the capital sentencing process, while also reducing the representative nature of capital juries and undermining public confidence in the administration of the death penalty. *See generally,* Susan D. Rozelle, *The Utility of* Witt*: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677 (2002).

1. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). This Court has long recognized that the unconstrained dismissal of capital jurors based on their views about the death penalty impairs the defendant's right to an impartial jury. To be sure, the State thus has a legitimate interest in excusing potential jurors who are "wholly unable even to consider imposing the death penalty, no matter what the facts of a given case." *Adams v. Texas*, 448 U.S. 38, 40 (1980). At the same time, however, permitting the liberal dismissal of jurors who express disagreement with the death penalty in general, or a reluctance to impose it, creates a constitutionally unacceptable risk of producing "a jury uncommonly willing to condemn a man to die." *Witherspoon*, 391 U.S. at 521. Removing jurors who have

qualms or hesitations about imposing the death penalty, but are able to fulfill their oaths and follow the court's instructions, inevitably skews the jury toward a capital sentence.[2] By removing those jurors who would think carefully about the evidence before choosing death, capital defendants are left with those jurors who will impose death less thoughtfully, and more readily, than a more representative jury would.

The constitutional limitation on the removal of jurors for cause from capital juries is also necessary to preserve the role of juries in representing the broader community's views on whether a defendant deserves death or leniency. *See Witherspoon*, 391 U.S. at 520; *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in the judgment). The Sixth Amendment "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). In a capital case, that "community participation" takes on special significance. "[O]ne of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a

---

[2] One study attempted to quantify the effect of death qualification on a jury's willingness to impose the death penalty by surveying registered voters regarding conclusions they had drawn about actual, on-going capital trials in the interviewees' county. After asking whether the subject would vote to impose the death sentence in the local trial, the study then determined whether the subject would be subject to disqualification based on his or her views on the death penalty. The authors found that death qualification would exclude 7.4% of those who favored the death penalty in the local cases, and 50.5% of those who favored life imprisonment. Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 387 (1982).

defendant convicted in a capital case) is to maintain a link between between contemporary community values and the penal system." *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (citation omitted).

Permitting courts broad authority to dismiss jurors who express reservations about the death penalty in general, or who show a reluctance to apply it to a particular set of circumstances, undermines the jury's ability to express the moral judgment of the broader community it represents. The unwarranted dismissal of "prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (citation omitted).[3] Because reservations about the death penalty are not evenly distributed throughout the community, that narrowing of the jury pool also risks undermining the jury's ability to accurately reflect the membership and views of the community. For example, according to one poll, striking all death penalty opponents from capital juries would remove 24% of whites, but 49% of African Americans. Joseph Carroll, Gallup Poll: Who Supports the Death Penalty? (Nov. 16, 2004). At the same time, such exclusion would also eliminate 23% of men, but 32% of women. *Id.* Because "community participation in the administration of the criminal law" is "critical to public confidence in the fairness of the criminal justice system," *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), the systematic exclusion of any segment of that community risks

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[3] Post-*Witherspoon* studies showed that excluding jurors who opposed the death penalty would eliminate almost a quarter of prospective jurors from the pool. Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1187 (1973). In 2000, it would have eliminated almost 40% of the community from serving on capital juries. Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 7, 10 (Stephen P. Garvey ed., 2003).

undermining public confidence in the fairness and integrity of the capital sentencing system.[4]

2. In light of these dangers, this Court has clearly established that the "State's power to exclude jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" *Gray*, 481 U.S. at 658 (quoting *Witt*, 469 U.S. at 423). Accordingly, death penalty jurors may not be excused for cause unless their views would "'prevent or substantially impair the performance of [their] duties [as jurors] in accordance with [their] instructions and [their] oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

In order to satisfy this standard, the prosecution must show more than that the juror is likely to be reluctant to impose the death penalty. *See, e.g., Lockhart*, 476 U.S. at 176. Even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* The death qualification process therefore specifically does not disqualify those who "expressed conscientious or religious scruples against" the death penalty, *Morgan v. Illinois*, 504

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[4] These concerns have led the Court to construe the Sixth Amendment to require that the jury pool (although not each particular jury panel) reflect a representative cross-section of the community. *See, e.g., Taylor*, 419 U.S. at 530-31. The refusal to require that juries themselves represent a cross-section of the community is a "direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury." *Lockhart v. McCree*, 476 U.S. 162, 174 (1986). But permitting the state to go further than is necessary in death-qualifying a jury would undermine the assumption that juries in death penalty cases are as representative of their community as juries in any other criminal case, sacrificing the legitimacy of and public confidence in the jury system.

U.S. 719, 732 (1992) (citation omitted), so long as they are also willing to perform "[their] duties [as jurors]," *Witt*, 469 U.S. at 424.

Nor must a juror be completely open to sentencing a defendant to death regardless of the mitigating circumstances of the case. The jury's function is to bring the community's moral sense to bear on the facts of each case. It is to be expected that some jurors will hold views that will make it difficult to obtain a sentence of death in some circumstances where the death penalty is nonetheless available. But the prosecution in a marginal capital case is not entitled to a jury composed only of those who would fail to recognize the weakness of its case, any more than a defendant accused of the most heinous crime is entitled to a jury composed only of those indifferent to his conduct.

Accordingly, jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." *Witherspoon*, 391 U.S. at 522 n.21. Their oaths only require them to *consider* the facts of the case before them and to exercise their *moral judgment* whether the mitigating facts of the case warrant leniency. A juror able to perform that function cannot be excluded even if there is substantial reason to believe that his moral judgment will guide him under the facts of the case to one result or another.

II. The Dismissal Of Juror Deal Was Unconstitutional And Warranted Habeas Relief.

In light of the foregoing principles, the state courts' conclusion that Juror Deal was subject to removal for cause from respondent's capital jury was sufficiently erroneous as to require the issuance of habeas relief.[5]

A. The State Courts' Dismissal Of Juror Deal Was Based Upon A Fundamental Misconstruction Of This Court's Decisions.

The state supreme court upheld Deal's removal from the jury on two grounds: (1) Deal "misunderstood the State's burden of proof in a criminal case and understood it to be 'beyond a shadow of a doubt'" instead of beyond a reasonable doubt; and (2) Deal "indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. Neither ground constitutes a constitutionally permissible basis for dismissal under *Witt*.

1. Deal's Misarticulation Of The Burden Of Proof Was Not A Legitimate Basis For Dismissal.

In filling out his juror questionnaire at the outset of jury selection – prior to reading his juror's handbook and obviously prior to receiving any instructions from the court – Deal stated that he was generally in favor of the death penalty "if it is proved beyond a shadow of a doubt" that the defendant killed and would kill again. J.A. 69. When told during *voir dire* that the standard of proof was "beyond

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[5] The error in the state courts' decision arises principally from a clear misconstruction and unreasonable application of this Court's clearly established precedents. Whether the resulting error is viewed as an unreasonable application of *Witt*, 28 U.S.C. § 2254(d)(1), or an unreasonable determination of the facts, *id.* § 2254(d)(2), makes no difference. In either case, the court of appeals' judgment should be affirmed.

reasonable doubt" rather than "beyond a shadow of a doubt," Deal quickly clarified that he "would be satisfied with a reasonable doubt standard" and "would be willing to follow the law." *Id.* 70. And when the judge questioned him specifically about his mistake, he remarked that it was probably terminology he heard while "watching Perry Mason or something," and he again confirmed that he understood and would apply the reasonable doubt standard. *Id.* 74.

Deal's inability to precisely articulate the standard of proof at the outset of the case, prior to receiving any instruction from the court, is a constitutionally impermissible basis for dismissal. The standard under *Witt* is whether the juror's views on the death penalty would substantially impair his ability to follow the court's instructions, not whether the juror requires instruction in the first place because he does not come to the court immersed in the finer points and distinctions of the law. *See* 469 U.S. at 424. As Judge Kozinski explained, "If all prospective jurors who did not fully understand the law before trial were struck, only lawyers would be allowed to serve on juries (and only a handful of lawyers at that)." Pet. App. 17a.

It is thus unsurprising that at trial the prosecution specifically disavowed any reliance on Deal's misunderstanding of the proper terminology to describe the state's burden of proof. J.A. 75. And it is notable that petitioner does not attempt to defend the state court's ruling on this ground in this Court.

2. Deal's Indication That He Would Give Substantial Weight To Whether The Defendant Might Kill Again Was Not A Legitimate Basis For Dismissal.

The state supreme court's second ground – that Deal "indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law," Pet. App. 173a – is both difficult to understand and plainly insupportable. Deal never purported

to be explaining his understanding of when state law would *permit* imposition of the death penalty, much less his understanding of the full set of circumstances under which a capital sentence may be imposed. He simply said he viewed death as an appropriate penalty when a defendant had killed and might kill again. J.A. 62, 69, 70. Petitioner nonetheless attempts to show that Deal's purported inclination to reserve the death penalty for cases in which a defendant poses a future threat to others rendered him incapable of fulfilling his duty as a capital juror. Pet. Br. 37-39. To the extent that conclusion was the basis for the state courts' decisions below, it constitutes an unreasonable application of this Court's clearly established precedents.

Under *Witt*, the "relevant inquiry is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (quoting *Witt*, 469 U.S. at 424) (internal quotation marks omitted). Accordingly, it is important to be clear on the nature and scope of a juror's duties under a particular state's sentencing regime. In Washington, a defendant convicted of aggravated murder and spared the death penalty is automatically sentenced to life without parole. Wash. Rev. Code § 10.95.030. The State leaves the choice between those options entirely to the discretion of the jury, which is required to answer a single sentencing question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code § 10.95.060. In answering that question, the jury is permitted by statute "to consider any relevant factors, including but not limited to . . . whether there is a likelihood that the defendant will pose a danger to others in the future." *Id.* § 10.95.070(8).[6] How much weight to give

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[6] The Solicitor General's assertion that "questions concerning whether the defendant might be released and kill again play no role under Washington law in the decision whether to impose a capital

that factor is left entirely to the judgment and discretion of each juror. *See id.*; *see also Smith v. Texas*, 543 U.S. 37, 46 (2004) (federal constitution requires that juries be allowed to give full consideration and effect to mitigating circumstances). Accordingly, in determining whether a defendant shall be put to death or sentenced to life without parole, a juror like Deal is permitted by statute to consider precisely the mitigating factor he indicated was important to him – whether the defendant might kill again if not sentenced to death. *See State v. Gentry*, 125 Wash. 2d 570, 641 (Wash. 1995); *State v. Finch*, 137 Wash. 2d 792, 864 (Wash. 1999).

Deal's right to give substantial mitigating weight to future dangerousness arises not simply from the relevant state statute, but also from the federal constitution. By 1986, this Court could say that it was "well established" that the Constitution "requires that in capital cases 'the sentencer . . . not be precluded from considering, *as a mitigating factor*, . . . any aspect of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)) (emphasis in original). And, in particular, the Court has held for more than twenty years that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Id.* at 5. Under this Court's clearly established precedents, "such evidence may not be excluded from the sentencer's consideration." *Id.*

Given the wide discretion that death-penalty juries necessarily possess, jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." *Witherspoon*, 391 U.S. at 522 n.21. To the

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sentence," U.S. Br. 21, is thus quite inexplicable. As discussed below, even a defendant sentenced to life without parole may kill again while in prison, a circumstance juror Deal was entirely open to considering. *See infra* at 15.

contrary, sentencing systems like Washington's provide jurors broad discretion to choose between life and death based on any relevant factor precisely in order to ensure the jury's role in "express[ing] the conscience of the community on the ultimate question of life or death." *Lockhart v. McCree*, 476 U.S. 162, 182 (1986) (citation omitted). It is both expected and desirable that members of that community will be more willing to impose the death penalty in some cases rather than others and that they will bring those general views to bear in particular cases.

Accordingly, *Witt* does not entitle the prosecution to a jury made up of individuals willing to impose death in all circumstances, or even a jury indifferent to the particular mitigating and aggravating factors at issue in the case before them. In fact, this Court has held that it is unconstitutional for a state to exclude jurors who are unable to promise that their general views about the death penalty will have no effect on their deliberations. In *Adams v. Texas*, 448 U.S. 38 (1980), the Court recognized that even in a system that provides capital jurors substantially less discretion than Washington's, the rendering of a sentence "is not an exact science, and jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Id.* at 46. With that in mind, the Court held that "it is apparent that a Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the 'guided jury discretion,' permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*." *Id.* at 46-47. If a juror may not be excused when his deliberations will be affected by his general views on the death penalty (a wholly irrelevant consideration in the sentencing decision), it follows *a fortiori* that a juror may not be excused simply because he indicates that his decision will be influenced by his view of the importance of a particular mitigating factor that he is entitled to rely upon under state and federal law.

It makes no difference that the mitigating factor important to Deal will be present in every case under the Washington sentencing statute. Even if it were constitutionally permissible for a state to prohibit a jury from considering future dangerousness when there is no possibility of parole, *contra Skipper*, 476 U.S. at 5, Washington has not done so. In specifically providing that the jury may consider whether "there is a likelihood that the defendant will pose a danger to others in the future" as a fact mitigating against death, Wash. Rev. Code § 10.95.070(8), the State plainly left it to the jury to decide whether the unavailability of parole and its effect on future dangerousness warranted leniency. In indicating that he would consider future dangerousness an important factor in assessing the death penalty, Deal did nothing more than demonstrate an inclination to do what the law plainly allowed him to do.

Finally, the fact that Deal was sometimes confused by the questions or gave uncertain responses about his views on the death penalty provided no constitutionally permissible ground to dismiss him from the jury. *Contra* U.S. Br. 19-21. This Court has recognized that it is not uncommon or suspicious that a juror's testimony may be "ambiguous and at times contradictory." *Patton v. Yount*, 467 U.S. 1025, 1039 (1984). Thus, in *Gray v. Mississippi*, 481 U.S. 648 (1987), this Court held that a juror was "clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria," *id.* at 658 (citation omitted), even though she was "somewhat confused," *id.* at 653, couldn't "make up her mind," *id.* at 654, and eventually was able only to say "I think I could" when asked whether she could vote for the death penalty, *id.* "It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed," and that prospective jurors "represent a cross section of the community, and their education and experience vary widely." *Patton*, 476 U.S. at 1039. Accordingly, "[n]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an

unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." *Adams*, 448 U.S. at 48. The law does not require a juror to have fully thought out his views on the death penalty before being deemed capable of serving on a capital jury. Nor is service limited to those who can easily follow and respond to lawyers' questioning. As the court of appeals rightly concluded, if the juror in *Gray* was unquestionably qualified to serve on a capital jury despite her inability to say for sure whether she could ever vote for the death penalty, there was no basis in this case to exclude Deal, who was able to repeatedly and decisively affirm his readiness to vote for death in an appropriate case. *See* Pet. App. 13a-14a & n.6.

B. There Was No Reasonable Basis For The State Courts To Conclude That Deal Was Unwilling To Consider The Death Penalty.

Although neither court below so found, petitioner implies that Deal went beyond indicating an intent to give lack of future dangerousness significant weight, and instead made clear that he would never vote for death nor consider it as an option in light of Washington's prohibition against parole in cases of aggravated murder. See Br. 38. That argument fails for several reasons.

First, Deal never said that he would be unwilling – or even reluctant – to impose the death penalty upon someone who is ineligible for parole. To the contrary, his concern focused not on whether "the defendant would be released," Pet. Br. 38, but on whether the defendant "would kill again." J.A. 69. He thus left entirely open that he might impose the death penalty in light of the risk that respondent would kill again while in prison. Indeed, prosecutors routinely argue that this risk to other prisoners and to prison staff is a reason to impose the death penalty rather than life without parole. *See, e.g., Calderon v. Coleman*, 525 U.S. 141, 149 n.2 (1998);

Kelly v. South Carolina, 534 U.S. 246, 253-54 (2002).[7] Moreover, even if Deal's answers could be understood to indicate that he would vote for the death penalty in more limited circumstances than might others, that is no basis for concluding that he was unable to fulfill his oath and exercise the broad discretion afforded juries under the Washington statute. *See Witherspoon*, 391 U.S. at 522 n.21.

Second, Deal never said that he would vote for death only if he were convinced that the defendant would kill again. The statements upon which petitioner relies were, for the most part, in response to broad questions that did not require Deal to describe the full set of circumstances in which he would vote, or decline to vote, for the death penalty. For example, in his juror questionnaire, Deal simply offered that he was "in favor of the death penalty . . . if a person has killed and would kill again." J.A. 69. He was not asked, and he did not say, whether this was the only circumstance in which he thought the death penalty would be appropriate. Likewise, it was in response to a generalized question – "why [do] you think the death penalty is appropriate, what purpose [does] it serve[]?" *Id.* 62 – that Deal stated, "if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." *Id.* Again, Deal was not asked for, and did not offer, a comprehensive catalogue of all the circumstances in which he would find the death penalty appropriate. He simply gave one example of a circumstance in which he would view death as a fitting punishment. When asked directly whether he could consider the death penalty even in the absence of any possibility of parole, Deal said on five separate occasions that he could.[8]

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[7] Neither the prosecution nor the trial court ever asked Deal whether the unavailability of parole would prevent him from voting for death in light of the danger respondent might pose while in prison.

[8] 1. "Q . . . Do you think that you could consider both options?

It is, of course, possible that Deal was lying or deluded. And if there were any indication that the trial court so concluded based on its observation of Deal's demeanor, respondent would have a difficult time overcoming the statutory presumption of correctness that would attach to that finding, for all the reasons petitioner and his *amici* explain at great length. But neither court made any such finding, and there is no reason to presume that they did so simply because the trial court excluded Deal and the state supreme court affirmed that decision. It is one thing to assume that the trial court implicitly found Deal excludable under the proper legal standard. *See Witt*, 469 U.S. at 430. It is quite another to assume from its silence that the court made every conceivable factual finding that might be helpful to the State in defending that decision in a subsequent habeas proceeding. Indeed, to do so would essentially eliminate habeas review of jury selection errors, for it is always possible to say that the trial

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A. Yes, I could." J.A. 62.

2. "Q . . . [D]oes that mean what I'm hearing you say is that you could consider either alternative?

   A. I believe so, yes." *Id.*

3. "Q . . . You would be willing to follow the law?

   A. Yes." J.A. 70.

4. "Q . . . I'm asking you, first, could you consider [the death penalty], and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

   A. Yes, sir." J.A. 72.

5. "Q. But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?
   A. I could consider it, yes.

   Q. Then could you impose it?

   A. I could if I was convinced that was the appropriate measure." J.A. 73.

court may have harbored some unspoken belief that an excused juror's demeanor indicated an unwillingness to follow the law.[9] Or, as Judge Learned Hand explained the risk: "He, who has seen and heard the 'demeanor' evidence, may have been right or wrong in thinking that it gave rational support to a verdict; yet, since that evidence has disappeared, it will be impossible for an appellate court to say which he was. Thus, he would become the final arbiter in all cases where the evidence of witnesses present in court might be determinative." *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). This is not deference, but abdication. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

While Congress has plainly required federal habeas courts to give deference to the trial court's ability to gauge the demeanor of jurors and witnesses, it is equally clear that Congress did not intend to thereby render habeas relief unavailable to remedy constitutional violations in jury selection. A balance must therefore be struck. That balance is most appropriately achieved by acknowledging that even when the record evidence might otherwise support a federal court's conclusion that the trial court's findings were unreasonable under 28 U.S.C. § 2254(d)(2) and (e)(1), special hesitation is warranted when the state court indicates on the record that its findings are based in significant part on

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[9] In this case, there is an affirmative basis to believe that the trial court did *not* base its decision on demeanor evidence not reflected in the record. The "body language" of another juror was the topic of explicit discussion in the record. *See* J.A. 54 (prosecution noting that the juror "crossed her arms, held her hand up, crossed her arms and sat back at that particular time"); *id.* 55 (defense counsel taking care to note that the juror's "body language was accurately reported" but contending that the attitude reflected was not disqualifying); *id.* 56 (court finding the juror "substantially impaired given her responses"). Despite the demonstrated willingness of the trial court and trial counsel to make note of significant demeanor evidence on the record, only Mr. Deal's words themselves bore mention. *Id.* 75.

demeanor evidence not apparent in the cold transcript. Conversely, however, the Court should be equally clear that the mere theoretical possibility that an otherwise unreasonable factual finding could have been supported on the basis of demeanor evidence will not preclude habeas relief, lest the Great Writ be rendered ineffective.

In this case, as Judge Kozinski compellingly demonstrated, the record clearly and convincingly demonstrates that there was no reasonable basis to find that Juror Deal was substantially impaired in his ability to perform his duties as a juror. The decision to excuse him nonetheless was based on a fundamental misconstruction of this Court's clearly established precedents regarding the proper basis for dismissal of a capital juror.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF OREGON, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, IDAHO, ILLINOIS, INDIANA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The question presented by petitioner's certiorari petition subsumes the following narrower inquiries as well:

1. Does 28 U.S.C. §2254(e)(1) require federal habeas courts to apply a presumption of correctness to a state court's implicit factual findings?

2. If a habeas petitioner claims that a state trial court unconstitutionally removed a prospective juror for cause, does the court's ability to observe the juror's demeanor warrant deference on habeas review?

3. If a prospective juror's statements during *voir dire* support competing reasonable inferences about his or her willingness to follow the law, can the juror's removal for cause provide a basis for federal habeas relief?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. AEDPA's presumption of correctness applies to implicit factual findings by state courts 5

A. AEDPA's text demonstrates that Congress intended the presumption of correctness to apply to state courts' implicit findings 7

B. If the presumption of correctness applies to explicit findings only, state court efficiency in criminal cases will be compromised 10

II. A state trial court's ability to observe a prospective juror's demeanor warrants deference 14

A. A trial court's ability to observe demeanor during *voir dire* should never be discounted 15

B. Deference to a trial court's ability to observe demeanor does not preclude meaningful federal court review 17

III. Because juror Deal's statements supported competing reasonable inferences about his willingness to follow the law, habeas relief is unwarranted 20

IV. The state court judgment here cannot be described as "contrary to" this Court's existing case law. 24

A. It must be presumed that the state courts applied the correct legal standard 25

B. Because the state court decision here does not differ from results reached by this Court when addressing "materially indistinguishable" facts, it is not contrary to this Court's jurisprudence 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Texas, 448 U.S. 38 (1980) 6

Anderson v. Bessemer City, 470 U.S. 564 (1985) 22

Ball v. Gladden, 443 P.2d 621 (Or. 1968) 10

Batson v. Kentucky, 476 U.S. 79 (1980) 18

Campbell v. Vaughn, 209 F.3d 280 (3d Cir. 2000) 12

Charles v. Texas, 146 S.W.3d 204 (Tex. Crim. App. 2004) 12

Crespo v. Armontrout, 818 F.2d 684 (8th Cir. 1987) 11

Darden v. Wainwright, 477 U.S. 168 (1986) 6 n.1

Gray v. Mississippi, 481 U.S. 648 (1986) 4, 27-28

Hernandez v. New York, 500 U.S. 352 (1991) 18, 22

Lichau v. Baldwin, 39 P.3d 851 (Or. 2002) 12

Maine v. Taylor, 477 U.S. 131 (1986) 22

Maine v. Watson, 900 A.2d 702 (Me. 2006) 11

Marshall v. Lonberger, 459 U.S. 422 (1982) 9, 22-23

Miller-El v. Cockrell, 537 U.S. 322 (2003) 8, 17

Miller-El v. Cockrell, 545 U.S. 231 (2005) 18-19, 23

Newsted v. Gibson, 158 F.3d 1085 (10th Cir. 1998) 12

Oregon v. Buchanan, 57 P.3d 930 (Or. Ct. App. 2002) . . . 10

Oregon v. Plummer, 980 P.2d 676 (Or. Ct. App. 1999) . . 11

Patton v. Yount, 467 U.S. 1025 (1984)) 15-16

Purkett v. Elem, 514 U.S. 765 (1995) 18

Quinn v. Texas, 958 S.W.2d 395
(Tex. Crim. App. 1997) 11

Rice v. Collins, 546 U.S. 333 (2006) 6, 16, 23

Sprosty v. Buchler, 79 F.3d 635 (7th Cir. 1996) 11-12

Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990) 12

Ventura v. Meacham, 957 F.2d 1048 (2d Cir. 1992) 12

Wainwright v. Witt, 469 U.S. 412 (1985) ..... *passim*

Williams v. Taylor, 529 U.S. 362 (2000) 26

Witherspoon v. Illinois, 391 U.S. 510 (1968) 5

Woodford v. Visciotti, 537 U.S. 19 (2002) 25

Young v. Dretke, 356 F.3d 616 (5th Cir. 2004) 12

STATUTES AND RULES:

Fed. R. Civ. P. 52 (a) 22

Former 28 U.S.C. §2254(d) 2, 7-10

28 U.S.C. §2254(d)(1) 4, 28

28 U.S.C. §2254(d)(2) 4, 19, 23

28 U.S.C. §2254(e)(1) 2, 4, 6-8, 19, 23, 24

INTEREST OF THE AMICI CURIAE

This case involves the degree of deference that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) —codified in pertinent part at 28 U.S.C. §2254—requires federal habeas courts to give to state court factual findings. This case thus implicates the amici States' interests in protecting the finality of criminal convictions that emerge from their courts, and in maintaining criminal justice systems that deter criminal acts and otherwise promote public safety. Amici also possess an abiding interest in the principles of comity and federalism that Congress intended to promote by adopting §2254.

SUMMARY OF ARGUMENT

Under *Wainwright v. Witt*, 469 U.S. 412 (1985), the trial court in a capital case may remove a prospective juror for cause if the juror's personal views "would prevent or substantially impair" his performance as a juror. In this case, the Ninth Circuit held that removal of prospective juror Deal for cause at respondent's aggravated murder trial was "contrary to" *Wainwright v. Witt*, and that AEDPA thus entitles respondent to federal habeas relief. But if the Ninth Circuit is correct, AEDPA *decreased* the deference due to state court factual findings in criminal cases, despite Congress's intent to require *increased* deference. The Ninth Circuit's reasoning contains four fundamental flaws.

1. Although AEDPA requires federal courts to presume that state court factual findings are correct, the Ninth Circuit refused to apply the presumption. It reasoned that neither the trial court nor the Washington Supreme Court had expressly found that Deal's personal views substantially impaired his ability to follow the law. But by removing Deal for cause, the state trial court necessarily —albeit implicitly— made that finding. State trial courts regularly make implicit factual findings in criminal cases, and state appellate courts regularly rely on those findings. If AEDPA's presumption of correctness is inapplicable to implicit findings, state trial courts will

deem it necessary to articulate all factual findings on each discrete legal issue that arises in the course of a case, and their ability to conduct criminal trials efficiently will be compromised.

Unsurprisingly, then, Congress drafted 28 U.S.C. §2254(e)(1) in general terms, applying the presumption of correctness to "a determination of a factual issue made by a State court." Congress simultaneously dispensed with *former* §2254(d)'s requirement that state court factual determinations are presumed correct only if "evidenced by . . . written indicia." By focusing on "determination[s] of a factual issue" generally, and by dispensing with more particular descriptions of the determinations in question, AEDPA's text requires that *any* state court factual finding—regardless of form, and whether express or implicit—is presumed correct. Tellingly, even under *former* §2254(d), this Court had held that a state court need not make express findings of juror bias to benefit from the presumption of correctness. Because AEDPA was intended to require even greater deference to state court findings than previously had been required, §2254(e)(1)'s presumption of correctness—no less than *former* §2254(d)'s presumption—necessarily applies to implicit state court findings.

2. The Ninth Circuit concluded that Deal's most general statements— that he would follow instructions, and that he "could" consider a death sentence—are unambiguous on their face, and that the trial court's ability to observe Deal's demeanor thus was without significance. But a trial court's ability to observe demeanor is potentially significant *whenever* it assesses the meaning and credibility of a juror's statements. As this Court repeatedly has explained, jury selection's idiosyncratic nature, and jurors' varying levels of education and courtroom experience, can make it difficult to assess juror statements accurately. Even when statements are unambiguous on their face, physical demeanor can demonstrate that they should not be taken at face value. In a case like this—in which some of Deal's statements suggested a willingness to vote for death only if the state proved facts that Washington law did not require it

to prove—demeanor can prove crucial to gauging whether a juror will perform his duties.

3. In essence, the Ninth Circuit held that Deal's removal would have been appropriate only if Deal had affirmatively stated that he was unwilling to follow instructions, or had affirmatively stated that he could never vote for death. Yet this Court's pre- and post-AEDPA decisions demonstrate that if the record supports competing reasonable inferences and if a state trial court chooses one of those inferences in resolving an issue, its decision provides no basis for habeas relief. Here, although Deal stated a general willingness to follow instructions and consider a death sentence, he also suggested that death would be appropriate only if the state proved that respondent would kill again or would "reviolate if released." Because Washington law did not require the State to prove those facts, a reasonable factfinder could have construed Deal's statements as reflecting an intent to substitute his personal standards for those created by Washington law. The record thereby permitted the trial court to find that Deal's personal views substantially impaired his ability to perform his duties. That finding is entitled to deference.

4. Finally, the Ninth Circuit erred by describing the state court decision as "directly contrary to" Supreme Court precedent. Because the Washington Supreme Court did not expressly find that Deal's personal views substantially impaired his abilities to follow the law, the Ninth Circuit concluded that it "applied the wrong standard." Yet both before and after AEDPA, this Court consistently has presumed that state courts apply correct legal standards. In this case, nothing in the record suggests that the Washington courts intended to apply anything other than the *Wainwright v. Witt* standard to Deal's removal. It thus must be presumed that they applied the *Wainwright v. Witt* standard.

In addition, the state court decision does not differ from results that this Court has reached when addressing "materially

indistinguishable" facts. For that reason also, it cannot be described as "contrary to" this Court's jurisprudence. The Ninth Circuit analogized Deal's statements to statements that failed to justify a for-cause removal in *Gray v. Mississippi,* 481 U.S. 648 (1986), but *Gray's* facts were significantly different. Unlike Deal, the juror at issue in *Gray* never qualified her general willingness to consider a death sentence. Further, the state supreme court in *Gray* affirmatively found that the juror in question was "clearly qualified to be seated as a juror," while the state courts in this case implicitly made the opposite finding. Because *Gray's* facts are not "materially indistinguishable" from those in this case, the state court decision is not "contrary to" this Court's case law. Federal habeas relief is unwarranted.

ARGUMENT

This case requires the Court once again to examine Congress's intent in adopting AEDPA, which modified the circumstances under which federal habeas courts may invalidate state court criminal judgments. To obtain relief under AEDPA, respondent needed to establish that the state court judgment (1) is "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent, or (2) is based on an "unreasonable determination of the facts." 28 U.S.C. §§2254(d)(1) and (2). Moreover, under 28 U.S.C. §2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct," and respondent bore "the burden of rebutting the presumption of correctness by clear and convincing evidence."

During jury selection in respondent's aggravated murder case, the state trial court granted the State's motion to excuse prospective juror Deal for cause. A jury subsequently convicted respondent of aggravated murder and sentenced him to death, and the Washington Supreme Court affirmed the trial court judgment on direct review. On federal habeas review, the Ninth Circuit held that Deal's for-cause removal violated respondent's Sixth Amendment and due

process rights. Pet. App. 19a-20a. As a result, the Ninth Circuit held that respondent is entitled to federal habeas relief with respect to his sentence, although not with respect to his conviction. Pet. App. 22a & n.11.

In its decision, the Ninth Circuit purported to "apply the substantive review standards of [AEDPA]." App. 6a n.2. Yet the Ninth Circuit ultimately ignored Congress's intent in adopting AEDPA and this Court's prior constructions of AEDPA. Indeed, if the Ninth Circuit's approach in this case is deemed correct, Congress's attempts to require federal habeas court deference to state court factual determinations, and to impose greater restrictions on federal court authority to vacate state convictions, will be rendered largely futile.

I. AEDPA's presumption of correctness applies to implicit factual findings by state courts.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), this Court "held that the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." *Wainwright v. Witt*, 469 U.S. 412, 416 (1985) (describing *Witherspoon*). Yet "the *Witherspoon* Court also recognized the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." *Witt*, 469 U.S. at 416. This Court thus has held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment" is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (*quoting Adams v. Texas*, 448 U.S. 38, 45 (1980)).

In this case, the Ninth Circuit deemed it significant that neither the Washington Supreme Court nor the state trial court had expressly found that juror Deal's personal views substantially impaired his ability to perform his duties. The Ninth Circuit concluded that the dissent—in suggesting that the trial court had adopted the prosecutor's suggestion that Deal "could not follow his oath and faithfully apply Washington's capital sentencing law" —"would impute to the state trial court a finding it never made." Pet. App. 20a n.10. The Ninth Circuit noted that, although the Washington Supreme Court concluded that two other excused jurors in this case were "'substantially impaired' in their ability to perform their duties,'" a "similar finding is missing from [that] court's discussion of [Deal]." Pet. App. 13a. Consequently, the Ninth Circuit deemed 28 U.S.C. §2254(e)(1)'s presumption of correctness inapplicable. *See* Pet. App. 20a n.10 (distinguishing *Rice v. Collins*, 546 U.S. 333 (2006), which dissent had described as applying §2254(e)(1)'s presumption under analogous circumstances, on basis that Washington Supreme Court "nowhere found that juror [Deal] could not follow his oath"); Pet. App. 36a-37a (Tallman, J., dissenting) (describing *Rice v. Collins*). That conclusion is without merit.

By removing Deal for cause, the state trial court necessarily found that Deal's views on capital punishment would prevent or substantially impair his ability to perform his duties as a juror.[1] And by affirming the trial court's judgment on direct appeal, the Washington Supreme Court necessarily found that the trial court had made any and all findings required by law. AEDPA's presumption of correctness—that is, §2254(e)(1)'s requirement that

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[1]It is undisputed that a determination that a prospective juror is "biased"—in the sense that his personal views impair his ability to follow instructions—is a factual finding. *See Darden v. Wainwright*, 477 U.S. 168, 175 (1986) (*Wainwright v. Witt* "made it clear that the trial judge's determination that a potential juror is impermissibly biased is a factual finding").

"a determination of a factual issue made by a State court shall be presumed to be correct"—applies to each of those implicit findings. Applying the presumption in that manner is consistent with Congress's intent and with this Court's federal habeas jurisprudence. The Ninth Circuit's refusal to apply the presumption to implicit findings in this case is without a principled basis.

A. AEDPA's text demonstrates that Congress intended the presumption of correctness to apply to state courts' implicit findings.

American jurisprudence generally presumes that a court, in making a ruling, made factual findings consistent with that ruling, even if those findings do not appear in the record. That presumption is a sensible one. Judges are, by definition, individuals who are trained in the law and who are required to resolve all pertinent factual and legal disputes that parties present to them in a particular case. Because a single case can require a judge to resolve significant numbers of those disputes, it is neither practical nor realistic to expect a court unfailingly to articulate all of its findings with respect to each discrete ruling it makes.

It therefore is unsurprising that 28 U.S.C. §2254(e)(1) requires federal habeas courts to apply a presumption of correctness not only to express state court findings, but to implicit findings as well. Prior to AEDPA's 1996 enactment, *former* 28 U.S.C. §2254(d) provided that "a determination after a hearing on the merits of a factual issue, made by a State court . . . , evidenced by a written finding, written opinion, or other reliable and adequate written indicia, [generally] shall be presumed to be correct." *See Witt*, 469 U.S. at 426 n.7 (quoting provision). AEDPA dispensed altogether with *former* 28 U.S.C. §2254(d)'s requirement that state court factual determinations– to "be presumed to be correct"—must be "evidenced by a written finding, written opinion, or other reliable and adequate written indicia." Under AEDPA, 28 U.S.C.

§2254(e)(1), rather than referring to "written indicia" of a state court's factual determinations, or to any other particular form that findings must take, more generally provides that "a *determination* of a factual issue made by a State court shall be presumed to be correct." (Emphasis added.) Its general reference to "a determination of a factual issue" suggests that *any* factual determination—regardless of form, and whether or not expressly articulated—warrants the presumption of correctness.

That conclusion comports with this Court's observations about Congress's intent in adopting AEDPA, and about AEDPA's effect. This Court has observed that "[s]tatutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 337 (2003). "Where 28 U.S.C. §2254 applies, our habeas jurisprudence embodies this deference" to state courts. *Miller-El I*, 537 U.S. at 340. Moreover, and as discussed in greater detail below, even before Congress adopted AEDPA and modified §2254, §2254 required federal habeas courts to presume that implicit factual findings by state courts were correct. Because Congress intended AEDPA to require even greater deference to state court decisions than previously had been required, AEDPA—no less than *former* §2254—necessarily requires federal courts to presume that implicit state court findings are correct.

Prior to AEDPA, this Court had held that implicit state court findings must be presumed correct. In *Wainwright v. Witt*, Witt's habeas petition alleged that the state trial court's decision to excuse juror Colby for bias was not entitled to a presumption of correctness because it was not "evidenced by a written finding, written opinion, or other reliable and written indicia." 469 U.S. at 430. Although the state trial court had made no express finding that Colby was biased, this Court held that the presumption of correctness applied:

> The transcript of the *voir dire* . . . shows that Colby was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked juror Colby to "step down." Nothing more was required under the circumstances to satisfy [*former* §2254(d)].

469 U.S. at 430. "We decline," the Court wrote, "to require the judge to write out in a separate memorandum his specific findings on each juror excused." *Id.* "Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning." *Id.* Instead, "[t]he finding is evident from the record" and "is therefore 'presumed correct' unless one of the enumerated reasons [in *former* 28 U.S.C. §2254(d)] for avoiding the presumption is present here." *Witt,* 469 U.S. at 430-31.

In *Marshall v. Lonberger,* 459 U.S. 422, 434 (1982), this Court similarly refused to "redetermine the credibility" of testimony that a state court implicitly had rejected. Although the defendant in an aggravated murder case testified that he had not knowingly entered a guilty plea for attempted murder, the state trial court admitted evidence of the attempted-murder conviction as evidence in the aggravated murder trial. *Id.* at 426-26, 428-29, 432. This Court described the state court's evidentiary ruling as "tantamount to a refusal to believe the [prisoner's] testimony" that he had misunderstood his earlier plea. *Id.* at 434. This Court essentially deferred to the state court's credibility determination, and presumed it correct, even though the state court had made no express credibility finding. *See* 459 U.S. at 434 ("28 U.S.C. §2254(d) gives federal habeas courts no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them").

Even prior to AEDPA, then, 28 U.S.C. §2254(d) required federal habeas courts to presume that implicit state court findings

were correct. AEDPA, in further restricting federal court review of state court determinations, requires at least that same level of deference.

B. If the presumption of correctness applies to explicit findings only, state court efficiency in criminal cases will be compromised.

In reviewing criminal convictions on direct appeal and in post-conviction cases, state appellate courts regularly rely on trial courts' implicit factual findings. If the presumption of correctness applies to explicit findings only, many state trial courts will be forced to alter longstanding practices, and to begin articulating all factual assessments and all legal reasoning that supports each discrete legal ruling made in the course of a trial. AEDPA should not be construed so that one of its core features—according greater deference to state court factual findings—can be attained only if state courts needlessly and inefficiently change their everyday practices.

State appellate courts regularly rely on implicit trial court findings when reviewing convictions on direct appeal. The Oregon Supreme Court, for example, has explained—while discussing "historical factual findings"—that "[i]f findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the ultimate conclusion . . . made by the trial court." *Ball v. Gladden*, 443 P.2d 621, 622 (Or. 1968). Oregon appellate courts consistently apply that principle when conducting direct review of state criminal convictions. *See, e.g., Oregon v. Buchanan*, 57 P.3d 930, 933 (Or. Ct. App. 2002) (relying on trial court's implicit factual findings when reviewing ruling that search exceeded scope of consent). Other States' appellate courts similarly rely on implicit factual findings when reviewing criminal convictions on direct appeal. *See, e.g., Maine v. Watson*,

900 A.2d 702, 713 (Me. 2006) (stating, in reviewing validity of waiver of counsel, that court "review[s] any express *or implicit* factual findings for clear error") (emphasis added); *Quinn v. Texas*, 958 S.W.2d 395, 402 (Tex. Crim. App. 1997) (stating, while reviewing motion for new trial, that "we in essence view the evidence in the light most favorable to the trial court's findings (or ruling, if there are no pertinent findings)").

A criminal trial court's implicit factual findings can prove dispositive in a wide variety of contexts. Issues that regularly are resolved by implicit trial court findings in state court criminal cases include the following:

- The validity of a defendant's waiver of counsel. *See, e.g., Maine v. Watson*, 900 A.2d at 713 (noting, while reviewing validity of waiver of right to counsel, that Maine Supreme Judicial Court will review "any express or implicit factual findings" by trial court for clear error).

- The validity of a search or seizure. *See, e.g., Oregon v. Plummer*, 980 P.2d 676, 678-79 (Or. Ct. App. 1999) (reviewing whether officer possessed subjective probable cause to arrest under Oregon Constitution, and "assum[ing]" that the trial court—in granting motion to suppress—"did not believe [the officer's] testimony about what she saw").

- Whether officers read *Miranda* rights prior to a custodial interrogation. *See, e.g., Crespo v. Armontrout*, 818 F.2d 684, 685-86 (8th Cir. 1987) (noting that Missouri trial court denied motion to suppress defendant's statements "[w]ithout making factual findings concerning credibility" of defendant's testimony that officers never read *Miranda* rights).

- Whether a defendant waived *Miranda* rights. *See, e.g., Sprosty v. Buchler*, 79 F.3d 635, 644 (7th Cir. 1996) (noting that Wisconsin trial court's denial of suppression motion "lead[s] to the obvious inference that the judge discredited [witnesses'] testimony" that defendant asked to speak to an

attorney, although judge had not "specifically address[ed] the[ir] veracity").

- Motions for a new trial. *See, e.g., Charles v. Texas,* 146 S.W.3d 204, 208 (Tex. Crim. App. 2004) (noting, while reviewing denial of motion for new trial, that we "presume that all reasonable factual findings that could have been made against the losing party were made against that losing party"); *Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990) (noting, in affirming denial of new trial motion, that California appellate court relied on "the trial court's implied factual determination 'that no juror misconduct occurred'").

In addition, state courts commonly rely on implicit findings to resolve state habeas or post-conviction proceedings. *See, e.g., Lichau v. Baldwin*, 39 P.3d 851, 857 (Or. 2002) (noting, while reviewing state post-conviction court's resolution of inadequate-assistance-of-counsel claim, that "we will presume that the facts were decided in a manner consistent with the [post-conviction court's] ultimate conclusion"); *Ventura v. Meacham,* 957 F.2d 1048, 1051, 1054-55 (2d Cir. 1992) (noting that Appellate Court of Connecticut, in reviewing denial of state habeas petition, relied on habeas trial court's "implied finding of fact" about reasons petitioner pleaded guilty); *Campbell v. Vaughn,* 209 F.3d 280, 290 (3d Cir. 2000) (noting that Pennsylvania Superior Court, in reviewing trial court's denial of post-conviction claim, "reviewed the evidence that the [post-conviction trial] court implicitly credited"); *Young v. Dretke,* 356 F.3d 616, 628-29 (5th Cir. 2004) (noting that Texas habeas trial court had made a dispositive "implicit factual determination"); *Newsted v. Gibson,* 158 F.3d 1085, 1088, 1091 (10th Cir. 1998) (concluding that Oklahoma Court of Criminal Appeals' "cursory" decision affirming denial of post-conviction petition "necessarily encompassed factual findings about the evidence in this case").

Accordingly, trial court judges across the country know that they need not make express factual findings on each issue that comes before them. Although appellate courts occasionally remind trial courts that express factual findings are helpful, trial court judges know that a failure to make express findings will not diminish the deference they are accorded in state or federal court. If AEDPA's presumption of correctness applies only to express factual findings, however, it will behoove state trial courts—in order to decrease the risk that a federal habeas petition will result in a retrial in state court—to articulate express factual findings with respect to each issue before them. Trial courts will be well advised to do so even if, as in this case, the ruling at issue has drawn no objection from the defendant. *See* Pet. App. 13a (noting lack of objection in this case, but also emphasizing that state courts made no express finding that Deal's view substantially impaired his abilities as a juror).

If the presumption of correctness applies only to express factual findings, state trial courts also will be well advised to articulate expressly the particular legal standards that they apply to each ruling, to reduce the likelihood that a reviewing court will misunderstand the import of any factual findings that the trial court has made. The result will be state court criminal proceedings in which trial courts, each time they make a legal ruling, painstakingly articulate both their findings and their reasoning. The result will be longer state criminal trials and longer state post-conviction proceedings. In short, whether AEDPA's presumption of correctness applies to implicit state court findings is significant not only to capital cases like this one, and to rulings involving "death-qualified" juries, but to all criminal and post-conviction cases tried in state courts, and to federal habeas cases generally.

II. A state trial court's ability to observe a prospective juror's demeanor warrants deference.

The Ninth Circuit acknowledged that "it is true, as the dissent suggests, that we owe the trial judge deference because of his ability to observe demeanor." Pet. App. 17a n.8. Nonetheless, the court refused to grant any practical significance to the state trial court's ability to observe juror Deal's demeanor. It concluded that "demeanor can only shed light on ambiguous language" and that, because Deal's "clear words were that he could impose the death penalty and would follow the court's instructions," demeanor could have no legal significance in this case. Pet. App. 17a n.8. But as this Court repeatedly has explained, a trial court's ability to observe demeanor is potentially significant *whenever* a question of juror impartiality is at issue, even if a juror's statements—on a cold transcript—appear unambiguous. The significance of that principle is even more pronounced in federal habeas cases, due to the highly deferential standard of review that AEDPA applies to state court decisions. If the Ninth Circuit is correct, and if juror Deal's demeanor is without legal import, the consequences are significant not only for cases involving removal of jurors for cause, but for cases involving peremptory challenges by prosecutors, and for all cases in which a trial court must assess witness credibility in the course of making evidentiary or other rulings.

A. A trial court's ability to observe demeanor during *voir dire* should never be discounted.

A trial court's ability to observe demeanor is potentially significant whenever it assesses statements by a prospective juror during jury selection. The need to defer to that ability is heightened in federal habeas cases, due to AEDPA. Although this Court has endorsed those principles before, they warrant reaffirmation, given the Ninth Circuit's failure to abide by them. Those principles are

consistent with AEDPA and with this court's repeated—and apt—observations about the unique nature of jury selection.

In *Wainwright v. Witt*, a pre-AEDPA case, the Court noted that, when a trial judge finds that a prospective juror is not biased, such a finding "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." 469 U.S. at 428. In making that observation, this Court emphasized the unique nature of the jury selection process. In determining if a "capital sentencing juror was properly excluded for cause," federal courts must recognize that a trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Id.* at 429. Although "it is the adversary seeking exclusion who must demonstrate . . . that the potential juror lacks impartiality," the Court rejected the proposition "that a juror's bias [must] be proved with 'unmistakable clarity.'" *Id.* at 423-24. The Court explained that "[w]hat common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Id.* "Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law," and "this is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 425-26.

This Court also focused on the idiosyncracies of the jury selection process in *Patton v. Yount*, 467 U.S. 1025, 1038 (1984), in explaining that ability to observe juror demeanor is "fundamental" to the process:

> Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated *voir dire* calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal.

> Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible.

467 U.S. at 1038 n.14. As a result, it is risky to assume that a *voir dire* transcript, by itself, will sufficiently reflect a prospective juror's ability to fulfill his or her duties. Instead, it is the trial judge "who is best situated to determine competency to serve impartially," given that jurors—due to their varying levels of education and courtroom experience—"cannot be expected invariably to express themselves carefully or even consistently." 467 U.S. at 1039. Thus, "[t]he trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Id.*

In sum, jury selection's idiosyncratic character requires reviewing courts to accord "special deference" to a trial court's assessment of juror bias. 467 U.S. at 1038. Even a statement that appears unambiguous on the printed page should not automatically be taken at face value if made during jury selection. In *Rice v. Collins*, 546 U.S. 333, ___, 126 S. Ct. 969, 972-73 (2006), for example, a criminal defendant objected to one of the prosecution's peremptory challenges by arguing that the challenge was based on the juror's race. As a "race-neutral explanation" for the challenge, the prosecutor stated, in part, that the juror "had rolled her eyes in response to a question from the court." 126 S. Ct. at 973. Yet under normal circumstances, the record will not automatically reflect eye rolling or other telltale physical behavior that accompanies a juror's statements. Even a simple "yes" or "no," although unambiguous on the printed page, accurately might be described by those who observed the juror as reflecting uncertainty. *See Patton v. Yount*, 467 U.S. at 1040 (noting that prospective juror "appears simply to have answered 'yes' to almost any question put to him," and that "[i]t is here that the federal court's deference must operate" because "only the trial judge could tell which of these answers was said with the greatest comprehension and certainty").

Juror statements that appear unambiguous need not be taken at face value by a trial court, and they *should* not be taken at face value by a reviewing court. Instead, reviewing courts must at least entertain the possibility that physical demeanor may have informed the trial court's assessment of the juror's ability to follow the law. *See Miller-El I*, 537 U.S. at 339 (on federal habeas review of claim that prosecutor exercised peremptory challenges based on juror race, "[d]eference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations"). Refusal to entertain that possibility is at odds with the realities of the jury selection process itself.

B. Deference to a trial court's ability to observe demeanor does not preclude meaningful federal court review.

The Ninth Circuit suggested that if the ability to observe demeanor is always potentially significant when reviewing a juror's removal for cause, meaningful federal court review will be precluded. Pet. App. 17a n.8. That concern is unwarranted. Although demeanor's significance can make the presumption of correctness difficult to overcome when challenging a *voir dire* ruling, meaningful habeas review is available nonetheless, and relief is not impossible to obtain. In some instances, a trial court's comments on the record will demonstrate that the court either misunderstood the pertinent legal standard or removed a juror based on a statement that — by itself, and as a matter of law — could not justify removal constitutionally. Relief will certainly be available under those circumstances, despite the trial court's ability to observe demeanor. Further, if a defendant believes that a juror's statements provide no basis for removal, and that the trial court did not rely on demeanor-based grounds to remove the juror, the defendant is free to inquire about those matters on the record at trial. He also is entitled to try to corroborate his suspicions at a post-conviction hearing. He may,

for example, be able to produce evidence demonstrating that the judge in question had expressly and consistently applied an incorrect legal standard when making similar rulings in that same case. Means do exist, in other words, to prove that a trial court erroneously removed a juror for cause, despite the general deference to which demeanor-based credibility assessments are entitled.

Miller-El v. Dretke (Miller-El II), 545 U.S. 231 (2005), demonstrates that deference to a trial court's ability to observe demeanor does not preclude habeas relief based on *voir dire* rulings. In *Miller-El II*, a criminal defendant objected to the State's use of peremptory challenges to remove black venirepersons. 545 U.S. at 236-37. The state trial court overruled the objections, finding that the prosecutor's race-neutral explanations were "completely credible." *Id.* at 236. This Court had noted previously that a trial court's assessment of a prosecutor's demeanor and credibility can be essential in determining if a peremptory challenge was constitutional under *Batson v. Kentucky*, 476 U.S. 79 (1980). *See Purkett v. Elem*, 514 U.S. 765, 769 (1995) (reversing Eighth Circuit because it "gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility"); *Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province'") (*quoting Witt*, 469 U.S. at 428). Much like this case, *Miller-El II* thus involved the type of ruling in which a trial court's ability to assess credibility, based on personal observations of in-court demeanor, often is dispositive.

Nonetheless, the prisoner in *Miller-El II* presented sufficient evidence, in his federal habeas case, to overcome the presumption that the state court had correctly found the prosecutor's motives to be race-neutral. That evidence included "widely known evidence" that the prosecutor's office in question had, in fact, promulgated a "general policy . . . to exclude black venire members from juries at

the time Miller-El's jury was selected." 545 U.S. at 253. In the end, the evidence that Miller-El presented of a discriminatory motive was "too powerful to conclude anything but discrimination." *Id.* at 265. *Miller-El II* demonstrates that deference to a trial court's ability to observe demeanor when assessing credibility does not render habeas relief illusory, even when a *voir dire* ruling is at issue.

At the same time, it must be remembered that AEDPA's "standard [for obtaining relief] is demanding," *Miller-El II*, 545 U.S. at 240, and that "clear and convincing evidence" is required to rebut §2254(e)(1)'s presumption of correctness. Similarly, a state court ruling that is grounded on a factual determination—as any removal of a juror for cause must be—can warrant habeas relief only if it was "based on an unreasonable determination of the facts." 28 U.S.C. §2254(d)(2). In light of those standards, and because assessing a prospective juror's bias is peculiarly within a trial judge's province, a habeas petitioner *should* find it difficult to overcome a trial court's finding that a juror's beliefs impaired his ability to follow his oath. That principle is absolutely consistent with—and compelled by—AEDPA. It is equally consistent with this Court's pre- and post-AEDPA case law.

As the above discussion reflects, trial court assessments of demeanor play a vital role not only when a court assesses juror impartiality and qualifications in a capital case, but whenever a court assesses a *Batson* objection to a peremptory challenge. Trial court assessment of demeanor also is crucial whenever a trial court makes evidentiary rulings, or other rulings before or during trial, that require it to resolve conflicts in testimony. In all of those contexts, AEDPA requires deference to a trial court's ability to observe the demeanor of those in its courtroom.

III. Because juror Deal's statements supported competing reasonable inferences about his willingness to follow the law, habeas relief is unwarranted.

In holding Deal's removal unconstitutional, the Ninth Circuit emphasized statements that could support an inference that Deal would be willing to perform his duties as a juror, but it ignored Deal's more particular statements. The Ninth Circuit emphasized that Deal answered "yes" when asked if he "could consider" the death penalty, and when asked if he "would be willing to follow the law." Pet. 10a-11a & n.5. The Ninth Circuit held, in essence, that the trial court could have lawfully dismissed Deal only if he had affirmatively stated that he was unwilling to follow the court's instructions, or had affirmatively stated that he would not vote for a death sentence under any circumstances. *See* Pet. App. 17a n.8 (deeming it significant that Deal's "words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary"); Pet. App. 10a n.5 (noting that Deal "stated *six times* that he could follow the law and impose the death penalty, while not *once* stating that he might not be able to") (emphasis in original).

Yet Deal made a number of more particular statements, and the trial court was entitled to infer from them that Deal's personal views would substantially impair his ability to follow Washington law. Deal wrote, in his juror questionnaire, that he was "in favor of the death penalty *if* it is proved . . . [that] a person has killed and would kill again." Pet. App. 240a-241a (emphasis added). When asked "about sort of the underlying reason why you think the death penalty is appropriate," Deal said, "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." Pet. App. 15a n.8. Further, Deal was informed during jury selection that a person convicted of aggravated murder would, at the least, be imprisoned for life without the possibility of parole. Pet. App. 15a n.8. Deal was asked, "can

you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?" Pet. App. 16a n.8. He responded, "I would have to give that some thought." Pet. App. 16a n.8. Deal later agreed that if "a person is locked up for the rest of his life," he "could also consider and vote for the death penalty," but added that "I could *if* I was convinced that was the appropriate measure." Pet. App 17a n.8 (emphasis added).

A reasonable factfinder could infer, after reviewing those statements, that Deal would be willing to impose a death sentence *only* if the state first proved that the respondent would kill again, or proved that he would "reviolate if released." It is undisputed, however, that Washington law does not require, as a prerequisite to a death sentence, proof that a person convicted of aggravated murder would kill again. Similarly, because Washington law does not authorize a person convicted of aggravated murder to be eligible for parole or other release, the state need not prove that an offender will "reviolate if released" to prove that death is warranted. *See* Pet. App. 29a (Tallman, J., dissenting) (citing Wash. Rev. Code §10.95.060(4), and noting that "whether the defendant was likely to re-offend . . . is not the standard for imposition of the death penalty in an aggravated murder case under Washington law"). A reasonable factfinder could infer that Deal was willing to vote for a death sentence only under certain standards—standards more restrictive than those created by Washington law—that he himself had designed. That inference, if drawn by the trial court, justified Deal's removal. *See Witt*, 469 U.S. at 421-22 ("[w]hether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme," and it need not establish that the juror "would never vote for the death penalty").

This Court has made it clear that, if the record supports two permissible yet conflicting factual inferences, a state court's decision to draw one of those inferences requires deference. Nothing in

AEDPA, or in this Court's case law, provides a basis for abandoning that principle. Even on direct review—that is, in cases in which review is not as deferential as it is under AEDPA—this Court has required deference whenever a trial court has chosen between competing factual inferences. In *Hernandez*, this Court reviewed a New York Court of Appeals judgment affirming a state-court conviction, and it applied the "clear error" standard of review that federal courts generally apply to federal district court findings. 500 U.S. at 358, 369; *see* Fed. R. Civ. P. 52 (a) (district court "[f]indings of fact . . . shall not be set aside unless clearly erroneous"); *Maine v. Taylor*, 477 U.S. 131, 145 (1986) ("the 'clearly erroneous' standard of review long has been applied to nonguilt findings of fact by district courts in criminal cases"). At issue in *Hernandez* was the state trial court's finding that the prosecutor possessed a race-neutral motive in removing Latino jurors. *Hernandez*, 500 U.S. at 369. This Court discerned no "clear error" by the state trial court, because the evidence supported conflicting views of the evidence:

> We discern no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of Latino jurors. We have said that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Hernandez, 500 U.S. at 369. *Hernandez* demonstrates that, if the record can support "two permissible views of the evidence," and if a trial court adopts one of those views in resolving a legal issue, no clear error has occurred.

Even before AEDPA, this Court required federal habeas courts to apply a standard of review to state court factual determinations that was at least as deferential as the "clear error" standard. In *Marshall v. Lonberger*, 459 U.S. 422, 432, 434-35 (1982), the Court noted that "[w]e greatly doubt that Congress," in

adopting *former* §2254, "intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." And in enacting AEDPA, Congress intended to increase the level of deference that federal courts must accord to state court determinations.

Consequently, AEDPA requires a petitioner to demonstrate that the *only* plausible reading of the state court record is at odds with the state court's dispositive findings. Only by doing so can he overcome 28 U.S.C. §2254(e)(1)'s presumption of correctness, and demonstrate—under U.S.C. §2254(d)(2)—that the state court decision is based on "an unreasonable determination of the facts." But if the record plausibly can be read in two different ways, and if the state court drew the factual inference at odds with the claim for relief, relief is unavailable.

Miller-El II supports that conclusion. In *Miller-El II*, this Court concluded that Miller-El had overcome the presumption of correctness in 28 U.S.C. §2254(e)(1), and that the state court unreasonably had determined that the State's peremptory challenges were prompted by race-neutral motives. Miller-El did so, the Court explained, by presenting evidence of the prosecution's motive that was "too powerful to conclude *anything but* discrimination." 545 U.S. at 265 (emphasis added); *see also* 545 U.S. at 275 (Thomas, J., dissenting) ("[t]o obtain habeas relief, then, Miller-El must show that, based on the evidence before the Texas state courts, the *only* reasonable conclusion was that prosecutors had racially discriminated against prospective jurors") (emphasis added). This Court framed the issue similarly in *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969 (2006). It assessed a state court finding that the prosecution's peremptory challenges were not racially motivated, and concluded that while "[r]easonable minds might disagree about the prosecutor's credibility" after reviewing the record, on "habeas review that does not suffice to supersede the trial court's credibility determination." 126 S. Ct. at 976.

Miller-El II and *Rice v. Collins* confirm that, if a state court record supports competing inferences, and if a state court draws one of those inferences, its determination of the facts must be deemed reasonable. Because those precise circumstances exist in this case, federal habeas relief is unavailable.

IV. The state court judgment here cannot be described as "contrary to" this Court's existing case law.

The Ninth Circuit held that "excusing juror [Deal] for cause was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal," and that respondent is therefore entitled to federal habeas relief. Pet. App. 19a-20a. That holding is erroneous. Because it must be presumed that the state courts applied the correct legal standard, and because nothing in this Court's case law prohibits a for-cause removal under the circumstances present here, habeas relief is unwarranted.

A. It must be presumed that the state courts applied the correct legal standard.

Rather than presuming that the state courts applied the correct legal standard, the Ninth Circuit did just the opposite. The Ninth Circuit concluded that *because* the Washington Supreme Court had not expressly found that juror Deal's views substantially impaired his ability to perform his duties as a juror, it necessarily must have applied the wrong legal standard. The Ninth Circuit stated that "[t]he Washington Supreme Court in this case *applied the wrong standard* with respect to juror [Deal]; it nowhere found that juror [Deal] could not follow his oath." Pet. App. 20a n.10 (emphasis in original). Yet AEDPA required the Ninth Circuit to presume that the state courts had applied the *Wainwright v. Witt* standard. Had the Ninth Circuit applied that presumption, it would have been compelled to further conclude that the trial court—in removing

Deal—necessarily *had* found that he "could not follow his oath," and that the Washington Supreme Court had relied on that finding to affirm the trial court's judgment.

Even prior to AEDPA, this Court consistently presumed that a state court—absent some explicit indication to the contrary—had applied the correct legal standard in making a particular ruling. In *Wainwright v. Witt*, the Court noted that, "[a]s we have stated on other occasions . . . , where the record does not indicate the standard applied to a state trial judge, he is presumed to have applied the correct one." 469 U.S. at 431. That same presumption is mandated by AEDPA. In *Woodford v. Visciotti*, 537 U.S. 19, 22-23 (2002), the Ninth Circuit concluded that the California Supreme Court had misunderstood the prejudice standard for ineffective-assistance-of-counsel claims, because the state court —rather than referring to whether it was "reasonably probable" that counsel's deficient conduct affected the verdict—"used the term 'probable' without the modifier 'reasonable.'" This Court, after noting that the case was governed by AEDPA, held that the Ninth Circuit had erred, and that its "readiness to attribute error is inconsistent with the proposition that state courts know and follow the law." *Id.* at 21, 24. "It also is incompatible with §2254(d)'s 'highly deferential standard for evaluating state-court rulings,' *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. at 24.

The presumption that a state court applied the correct legal standard could be overcome by some affirmative indication in the record that the court misunderstood the applicable standard. Here, however, nothing affirmatively suggests that either the state trial court or the Washington Supreme Court misunderstood *Wainwright v. Witt*. In fact, the Ninth Circuit acknowledged that both state courts had expressly applied that standard with respect to two other jurors who had been removed for cause. *See* Pet.

App. 9a-10a (stating that "the trial judge properly excused [juror] X for cause, finding that her views on the death penalty would 'substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and oath,'" and that "[t]he trial judge properly excused juror Y for cause as well, noting that her impairment was 'obvious'"); Pet. App. 13a ("[w]hen the Washington Supreme Court upheld the trial judge's decision to excuse jurors X, Y, and [Deal] for cause, it found that both X and Y were 'substantially impaired' in their ability to perform their duties as jurors"). It is undisputed, in other words, that the state courts expressly invoked and applied the correct legal standard in addressing two of the for-cause removals in this case. To conclude that the state courts nonetheless applied some other unidentified, and incorrect, standard to juror Deal conflicts with common sense, with AEDPA's "highly deferential" standard of review, and with this Court's longstanding assumption that state courts apply correct legal standards.

B. Because the state court decision here does not differ from results reached by this Court when addressing "materially indistinguishable" facts, it is not contrary to this Court's jurisprudence.

The state court decision in this case cannot be deemed "contrary to" clearly established federal law. In *Williams v. Taylor*, 529 U.S. 362, 406 (2000), this Court held that a state court decision will "be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Here, neither the state trial court nor the Washington Supreme Court reached a result that differs from results reached by this Court when addressing "materially indistinguishable" facts.

Prospective juror Deal indicated a general willingness to follow the court's instructions while simultaneously suggesting that he considered a death sentence appropriate only under criteria not required by Washington law. This Court has never addressed precisely those circumstances. Accordingly, it has never held that a trial court—based on statements that are "materially indistinguishable" from those that juror Deal gave—may not remove a juror for cause. Concluding that the state court decisions were "contrary to" clearly established federal law, as the Ninth Circuit did here, is itself contrary to 28 U.S.C. §2254(d)(1), to Congress's intent in enacting it, and to this Court's case law.

The Ninth Circuit mistakenly suggested that this case is analogous to *Gray v. Mississippi*, 481 U.S. 648 (1986). It concluded that Deal's removal was unconstitutional because, "[j]ust like the juror at issue in *Gray*, juror [Deal] 'ultimately stated that [he] could consider the death penalty in an appropriate case.'" Pet. App. 14a *(quoting Gray*, 481 U.S. at 653). Yet the facts in *Gray* cannot be described as "materially indistinguishable" from the facts in this case. In *Gray*, prospective juror Bounds stated that "I think I could" when asked if she "could vote for the Death Penalty," and she agreed that she had no "conscientious scruples against the imposition of the Death Penalty, if it's authorized by law." 481 U.S. at 653 n.5. The trial court granted the State's request to remove her; this Court held that the trial court erred by doing so. 481 U.S. at 655, 659.

Juror Deal, however, expressed a more qualified willingness to vote for death than did Bounds. Deal stated that "I could [impose a death sentence] *if I was convinced that [that] was the appropriate measure*"; his other statements suggested that death is "appropriate" only if the state proves certain facts—a tendency to kill again or to "reviolate upon release"—that state law did not require it to prove. Pet. App. 17a n.8, 15a n.8, 240a-241a (emphasis added). Deal's statements reasonably can be construed

as reflecting a willingness to vote for death only if the juror's own *personal* standards, as opposed to standards defined by applicable state law, were satisfied. *Gray* contains no reference to statements by juror Bounds that could have been construed in a similar manner.

It also must be remembered that, while the trial court in *Gray* excused the juror at issue for cause, 481 U.S. at 655, neither the trial court nor the Mississippi Supreme Court found that the juror's statements and views rendered her removable under *Wainwright v. Witt*. At trial, "[d]efense counsel pointed out that Bounds' answers to the questions did not render her excludable," and the trial judge "agreed that the prosecutor had not used the appropriate language" in questioning her. 481 U.S. at 655. Moreover, "[e]very Justice of the Mississippi Supreme Court expressly stated that [Bounds] . . . 'was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria.'" 481 U.S. at 659. Further, this Court noted that the state supreme court's ultimate decision—which deemed any error in removing Bounds to be harmless—"is susceptible to three possible interpretations" with respect to how it understood the trial court's actions. *Id.* at 661. None of those interpretations reflected a state supreme court finding that the trial court, in removing Bounds, had believed itself to be applying the *Wainwright v. Witt* standard, or had removed Bounds based on findings that comported with that standard. *Gray*, 481 U.S. at 661. In short, the state courts in *Gray* made no finding—implicit or otherwise—that Bounds' views substantially impaired her ability to follow instructions. For that reason also, the facts in *Gray* cannot be described as "materially indistinguishable" from those in this case. Because the state court decision here is not "contrary to" *Gray* or to any other decision by this Court, AEDPA does not authorize federal habeas relief.

CONCLUSION

This Court should reverse the Ninth Circuit's judgment.

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